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Ernest G. Johnson
Director, Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

DOCKETED BY	nr
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Re: Generic Investigation into Preferred Carrier Arrangements
Docket No.: T-00000K-04-0927

Dear Mr. Johnson:

Attached are the Comments of Accipiter Communications, Inc., (now doing business as Zona Communications) in Response to Staff's Preferred Provider Agreements Issues List dated November 6, 2007 filed in the above referenced Generic Docket. Per your request, the original and 13 copies of this letter with attachments are being filed in docket control.

As general comments Accipiter incorporates and references its "Initial Comments" brief filed in this Docket on March 22, 2007, and "Supplemental Comments," filed on July 27, 2007.

The Preferred Provider Agreements ("PPAs") that are of primary concern to Accipiter in its service area are secret PPAs in new Master Planned Communities ("MPC"). These PPAs often include the developer of the MPC paying the preferred provider to subsidize the preferred provider's initial installation of facilities in the MPC. The developer also agrees to sign up homebuyers for the preferred provider's services frequently using the homeowners' association which is initially controlled by the developer. In return, the preferred provider agrees to pay to the developer a specified increasing share of the preferred provider's subscriber revenues. The kickbacks are not limited by the amount of subsidy paid by the developer but instead are derived from the market penetration rates achieved for the preferred provider in the MPC. The economic incentives built into these PPAs first of all undermine the otherwise cooperative relationships that normally exist between those building MPCs and the service providers that desire to offer competing telecommunications services to new homeowners and businesses moving into the MPCs; and secondly destroy competition in MPCs.

End the secrecy. PPAs should be filed with the Commission for all to see and grasp.

- The Commission would be aware of the payment commitments of the utilities it regulates.

- The ratepayers could know how much of their monthly telecom bills are siphoned back to the developers of the MPC.
- The competing service providers should know what the preferred provider's terms are.
- Disclosure of PPA terms should occur in a timely fashion so that the vital first mover advantage is not always entirely ceded to the preferred provider.

Weighted commission payments are little understood despite the vast dollars involved. These terms set the amount of kickbacked dollars paid by the preferred provider. The kickbacks are calculated from the number of customers that subscribe or from the revenues collected by the preferred provider. One should realize the effect of these weighted payment schemes often worth millions of dollars. They create tremendous economic incentives for the developer which controls access to the MPC (and therefore controls access to the customers) to exclude the competition.

It was through secrecy combined with the anticompetitive behavior encouraged by weighted commission payments that the most graphic example of an anticompetitive PPA (that Accipiter is aware of) in Arizona was allowed to be created. In the Vistancia MPC, a typical PPA with kickback payments from the preferred provider to the developer eventually grew and was transformed by the parties to the PPA into a tangled web of private telecommunications easements and licensing terms. The developer demanded a million dollars in entry fees for its private easements superimposed over the public utility easements in the MPC. The million dollar entry fees were claimed to be charged equally to all providers in the MPC. However the million dollar payments were not incurred by the preferred provider but instead was fabricated out of sham payments back and forth with the MPC and buried within the secret PPA, all in an effort to exclude the competition from the MPC customers. For market forces to work properly, the secrecy must end.

In 1997 the Commission tried to ensure that the major preferred provider operating in Accipiter's new service area would give prior notice of its entry into unserved areas. However this has not been done in an effort to gain quietly the advantages discussed above.

For drafting Arizona regulations we believe that the North Carolina regulations with their definitions of "preferred provider contracts" and "weighted commission provisions" can be used as a starting point. However, instead of using the "electing provider" and "exempted provider" concepts and the resale requirements that North Carolina adopted, Accipiter recommends that early open disclosure of the terms of all PPAs should be at the heart of Arizona regulations designed to reduce significantly the anticompetitive incentives that PPAs currently foster.

Attached are Accipiter's specific responses to the enumerated issues listed by Staff.

Sincerely,

ACCIPITER COMMUNICATIONS, INC.



Patrick Sherrill

Enclosures

1 ORIGINAL and 13 copies filed this
2 1st day of February, 2008, with:

3 Docket Control
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5 1200 West Washington
6 Phoenix, Arizona 85007

7 COPY of the foregoing hand-delivered
8 this 1st day of February, 2008, to:

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24 COPY of the foregoing mailed
25 this 1st day of February, 2008, to:

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RESPONSES OF ACCIPITER COMMUNICATION, INC. TO STAFF'S
PREFERRED PROVIDER AGREEMENTS ISSUES LIST
DOCKET NO. T-00000K-04-0927
DATED NOVEMBER 6, 2007

PPA 1-1 What do you believe the scope of this proceeding should be and what issues should the Commission address with respect to the use of preferred provider/preferred carrier/marketing agreements in master planned communities?

Response: The scope of this proceeding should include agreements between real estate developers and suppliers of communications services that limit the ability of competing communications suppliers to provide their services within master planned communities. The kinds of limitations that should be addressed include excluding competing suppliers from the development altogether, raising rivals' costs of entering the development, and providing for exclusive marketing agreements. Raising rivals' costs involves keeping competitors out until after the streets are paved and sidewalks, driveways and curbs are installed. Raising rival's costs may also involve preventing telecommunications carriers from achieving economies of scope by excluding them from the provision of broadband and video services or requiring homeowners to pay fees for such services from the developer's chosen supplier whether they subscribe to them or not. Among the public interest issues at stake are the need to prohibit anticompetitive practices, make public the arrangements that may be contrary to the interests of homeowners and enforce carrier-of-last-resort obligations.

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PPA 1-2 Does your company enter into preferred provider/preferred carrier agreements with property owners/developers of master planned communities that address issues associated with:

- a. The installation of telecommunications network facilities?
- b. The price associated with the installation of those facilities?
- c. Marketing of telecommunications services?
- d. Distribution of sales literature?
- e. Statements regarding the property owner/developer's "preferred" provider of telecommunications services?
- f. Incentives to the property owner/developer to encourage end user customers to obtain telecommunications service from the "preferred" provider of telecommunications services?

Response: No. Accipiter has not entered into PPAs with property owners/developers of master planned communities.

Accipiter entered into a Settlement Agreement with Cox and the master developer in the Vistancia Development in order to "un-do" a PPA that had previously existed in that development, which arguably could be considered to address the above listed items. The Settlement Agreement is currently under review by the Commission in ACC Docket No. T-03471A-05-0064. The settlement requires the master developer to use its best efforts to encourage homebuilders or commercial developers in the Vistancia Development not to enter into exclusive marketing arrangements with communication services providers, and (among other things) it requires the master developer to distribute marketing literature of Cox or Accipiter to the builders in the development if requested by the service providers. The Settlement Agreement also includes terms relating to acquisition of land by Accipiter for installation of its equipment, and it addresses numerous other issues.

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PPA 1-3 Please describe what you would characterize as a preferred provider/preferred carrier agreement. Please describe in detail the provisions of any preferred provider/preferred carrier agreement that you have entered into with property owners/developers of master planned communities.

Response: Preferred carrier arrangements include agreements between real estate developers and communications suppliers that often restrict the ability of competing communications suppliers to provide their services within master planned communities, including excluding competitors from access to homes, homeowners and rights of way, limiting homeowners' choice of providers and preventing rivals from marketing their services.

The North Carolina Commission in its regulations relating to PPAs used the term "preferred provider contract" defined as follows:

"Preferred provider contract" means a contract between a particular local service provider and the owner or developer of a development, giving the preferred provider special status or rights not available to other local service providers.

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PPA 1-4 If your response to PPA 1-2 is in the affirmative, please describe any revenue sharing provisions from such agreements. Are revenue sharing provisions a standard or typical provision in such agreements.

Response: Not applicable

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PPA 1-5 Please describe what you would characterize as a marketing agreement. Please describe in detail the provisions of any marketing agreement that you have entered into with property owners/developers of master planned communities.

Response: A marketing agreement within a master planned community often prevents rivals of a developer's chosen communications provider from advertising their services on the developer's premises.

Accipiter believes that a "marketing agreement" of concern in the regulatory sense would be one that also falls within the definition of a PPA as defined in the North Carolina regulations:

"Preferred provider contract" means a contract between a particular local service provider and the owner or developer of a development, giving the preferred provider special status or rights not available to other local service providers.

A preferred provider agreement that addresses "marketing" would be considered a "marketing agreement."

Accipiter has not entered into any "marketing agreements" with developer/owners. See the response to PPA 1-2.

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PPA 1-6 Please provide the following information for each preferred provider agreement/preferred carrier/marketing agreement with master planned communities signed since April 1, 1998 to current within the State of Arizona. Please provide all information in excel, spreadsheet, electronic file format. Each item named below should be taken to represent a column heading in an excel spreadsheet.

- a. The name and date of each agreement.
- b. The name of the master planned community.
- c. The name of each party participating in the agreement.
- d. A contact name corresponding to the name of each party participating in the agreement.
- e. The address of the contact name corresponding to the name of each party participating in the agreement.
- f. The phone number of the contact name corresponding to the name of each party participating in the agreement.
- g. The signing (From) date of the agreement.
- h. The ending date (To) of the agreement.
- i. The number of residential units, homes, main accounts or lines expected to be covered by the agreement.
- j. The number of business units, main accounts or lines expected to be covered by the agreement.

Response: Not applicable. See the response to PPA 1-2.

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PPA 1-7 Have you entered into an agreement that prohibits property owners/developers from marketing the services of other telecommunications service providers within such master planned communities?

Response: No.

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PPA 1-8 Can property owners/developers who have preferred provider/preferred carrier or marketing agreements with you distribute, or allow to be distributed, the advertising literature of any other telecommunications company?

Response: Not applicable. See the response to STF 1.7.

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PPA 1-9 If your response to PPA 1-8 is negative, please indicate whether you consider such terms to be anti-competitive from the end-users' perspective and the rationale for your position.

Response: Exclusive marketing agreements with developers can often spawn anti-competitive conduct. The developer holds a unique position with regard to marketing activities aimed toward to new home buyers in MPCs. First of all there is an obvious advantage to a preferred provider gained through access to information that allows early identification of serious home buyers and through the direct access to buyers that is often obtained by contracting to employ the developer/builder's sales force to sign the customers for telecom service at the same time buyers are selecting the other options for their new homes. Then making matters much worse, the preferred provider agreements often specify "weighted commission provisions" to be paid to the developer.

The North Carolina regulations define "weighted commission provisions as follows:

"Weighted commission provisions" are provisions of a preferred provider contract providing for the payment of commissions to an owner or developer that (A) are based on the number of customers in the development who purchase service from the preferred provider, or (B) are based on a percentage of the revenues received by the preferred provider from customers in the development, or (C) otherwise provide a financial incentive for the owner or developer to exclude competitors of the preferred provider from the development.

Depending on how the PPA is structured and the size of the development, under these weighted commission provisions achieving even as little as five or ten percent higher penetration rates can result in massive differences in the amount of commission money received by the developer. These weighted commission pay scales provide huge monetary incentives for the developer to "lock up" the development for the preferred provider without any express contract terms requiring the developer to do so.

For examples of "weighted commission provisions" see the attached **Exhibit A**, Co-Marketing Agreement (the compensation schedule is in exhibit G (the final attachment) to that agreement), and se the attached **Exhibit B**, Property Access Agreement (the compensation schedule is in paragraph #8 of that agreement, at pages 11 & 12).

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PPA 1-10 Do your agreements include services other than telecommunications services?

Response: Not applicable. See the response to PPA 1-2.

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PPA 1-11 What consideration do property owners/developers of master planned communities receive as compensation for entering into either preferred provider/preferred carrier/marketing agreements with telecommunications carriers?.

Response: Although Accipiter has not participated in preferred provider/preferred carrier/marketing agreements with property owners/developers, Accipiter believes that within such agreements the developer often receives cash compensation in various forms. The compensation elements within these agreements are often structured so that the developer receives more compensation as the preferred carrier achieves higher levels of market penetration or revenue streams within the development, thus giving the developer an incentive to provide the preferred carrier with as much of a competitive advantage as possible. The developer also may receive a commitment from the preferred provider to provide service on a timely basis. Specified minimum levels of service and pricing provisions may also be included. Some PPAs also address free or reduced price service such as service for community channels or common area services or bulk service arraignments that provide a minimum service paid through involuntary association dues imposed whether the homeowner elects to receive the service or not. See also, Accipiter's response to PPA 1-9 above.

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PPA 1-12 Do your agreements include items such as exclusive marketing rights which limits the ability of your competitors to market their services in areas where you have entered into agreements with the property owners/developers of master planned communities?

Response: Not applicable. See the response to PPA 1-2.

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PPA 1-13 Should preferred provider/preferred carrier/marketing agreements be allowed in master planned communities, and in your opinion, are they in the public interest? Please elaborate.

Response: Under current law, it may not be possible to prohibit developers/property owners and telecommunications carriers from signing preferred provider agreements. The act of designating a preferred provider for a development, in and of itself, is not necessarily harmful to competition or universal service. However, if a preferred provider agreement has the effect of establishing an exclusive provider for a development, then such an agreement would violate the principles of competition and universal service, which are the cornerstones of our national telecommunications policy. In extreme cases, such agreements may violate Section 253 of the Telecommunications Act of 1996 if they constitute unlawful barriers to entry and include participation by a municipal entity.

A developer may effectively create an exclusive provider in a number of ways including but not limited to: (a) restricting a provider's access to open trenches within the development for the placement of underground infrastructure, or providing access to open trenches on terms and conditions which are not substantially equivalent between providers; (b) establishing legal barriers to entry into the development; (c) imposing significant right-of-way fees; (d) entering into long-term contracts with providers through homeowners associations; (e) adopting covenants, conditions and restrictions ("CC&Rs") which favor one provider over another; (f) adopting CC&Rs which favor one telecommunications technology over another; (g) placing discretion in the hands of the developer/property owner regarding the types of telecommunications services that may be provided in the development; and (h) imposing construction requirements or other requirements that have the effect of favoring one provider over another.

Each of the above-listed practices can restrict or eliminate competition by increasing the costs of entry to a competitor, or in some cases, prohibiting entry to a development outright. In some cases, such practices may actually prohibit an incumbent local exchange carrier from acting as carrier of last resort. Clearly, restrictions on customer choice and access to universal service are contrary to the public interest. In addressing these issues, the Arizona Corporation Commission should focus its attention on

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anti-competitive practices that have the effect of creating a *de facto* exclusive provider, rather than solely on the existence of a preferred provider.

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PPA 1-14 Provide a copy of a "standard" preferred provider preferred carrier/marketing agreement that you have entered into, and any associated or related agreements governing your provision of service to a master planned community.

Response: Not applicable. See the response to PPA 1-2. However, attached as **Exhibits A & B** are two examples of PPAs. **Exhibit A**, the Co-Marketing Agreement addresses residential services, and **Exhibit B**, the Property Access Agreement addresses commercial services.

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PPA 1-15 What are your standard terms for the installation of facilities in a master planned community?

Response: The standard terms for the installation of facilities in a master planned community are contained in Accipiter's tariff on file with the Arizona Corporation Commission and in Arizona Administrative Code R14-2-501 *et seq.*, and specifically, R14-2-506. Accipiter works to make sure service is timely provided as needed by the new homeowners or businesses.

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PPA 1.16 What are the benefits to the telecommunications service provider of entering into preferred provider/preferred carrier/marketing agreements in master planned communities? What are the benefits to the developer?

Response: Although Accipiter has not participated directly in preferred provider/preferred carrier/marketing agreements with property owners/developers, Accipiter believes the benefit to the preferred provider depends upon the specific structure and content of the agreement. Service provider benefits could include substantial subsidies paid by the developer for the initial installation of facilities, the purchase of an effective shield against competition entering the development provided by the developer, more efficient marketing effort, higher market penetration within the development, larger customer revenue stream, and/or more efficient installation effort. Regarding disadvantages, Accipiter believes that if these agreements are not structured properly the preferred carrier could potentially violate regulatory/legal prohibitions by exhibiting anticompetitive behavior.

The developer is able to purchase the assurance of full service available for the first house sold, and participates in an ongoing revenue stream with tremendous upside potential stretching many years into the future, even long after the development is complete.

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PPA 1.17 What are the benefits to the property owner/developer of entering into preferred provider/preferred carrier/marketing agreements in master planned communities? What, if any, are the disadvantages?

Response: Although Accipiter has not participated directly in preferred provider/preferred carrier/marketing agreements with property owners/developers, Accipiter believes that within these agreements the developer often receives the benefit of cash compensation and certain guarantees from the preferred carrier regarding quality of service, timeliness of service installation, etc. It is notable that the cash compensation within these agreements is often tied to metrics that give the developer an incentive to protect the preferred carrier's market share within the development. The incremental cost in committing the developer's sales force to signup customers for the preferred provider is minimal, while the ability to deliver most of the new homeowners to a single carrier creates significant cash payments to the developer.

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PPA 1-18 What is the standard term (months or years) of a preferred provider/preferred carrier/marketing agreement with a property owner/developer of a master planned community?

Response: Although Accipiter has not participated directly in preferred provider/preferred carrier/marketing agreements with property owners/developers, Accipiter believes that the standard term of these agreements is a long enough time period (Accipiter understands that terms are commonly 10 years or more) for the preferred carrier to establish a significant customer base in the development.

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PPA 1-19 Are third party telecommunications companies allowed to provide service over facilities that are used to provide services that are covered by a preferred provider/preferred carrier/marketing agreement in master planned communities? If your response is in the affirmative, under what rates, terms and conditions is this allowed?

Response: Accipiter believes that the answer to this question would depend upon the specific agreement and the parties. Accipiter has not provided service over the facilities of a preferred provider in a PPA development.

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PPA 1-20 Do you enter into other agreements, other than preferred carrier or marketing agreements, with developers that relate to the provision of telecommunications services? If so, please describe these agreements.

Response: To date, Accipiter has not entered into any formal construction agreements or marketing agreements with developers. Incumbent local exchange carriers may, from time to time, enter into construction agreements with developers for the installation of telecommunications facilities in new developments. Such construction agreements are in accordance with tariffs approved by the Arizona Corporation Commission and the Commission's rules, including Arizona Administrative Code R14-2-506.

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PPA 1-21 Do you believe the preferred carrier agreements or marketing agreements provide an impediment to the ability of end users to purchase telecommunications services in a competitive market? Please explain why you believe that they do or do not impede customers' access to a competitive telecommunications marketplace.

Response: Preferred carrier agreements and marketing agreements can impede the ability of end users to purchase telecommunications services in a competitive market. See the response to PPA 1-13.

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PPA 1-22 Do you believe that preferred carrier agreements are anti-competitive?
Please explain the basis for your belief.

Response: Preferred carrier agreements can be implemented in such a way as to be
anti-competitive. For additional information, see the response to PPA 1-
13.

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PPA 1-23 Do you believe that exclusive marketing agreements which prevent property owners/developers from marketing a competitor's service in master planned communities are anti-competitive? Please explain the basis for your belief.

Response: Accipiter believes that exclusive marketing agreements could be anti-competitive. Accipiter believes that the most effective marketing to a prospective new homeowner occurs while the homeowner is making the home-buying decision. Since the developer/builder often controls this process and may have financial incentive to direct the prospective home buyers to chose the preferred provider's services, exclusive marketing could provide an unfair advantage to the preferred provider.

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PPA 1-24 Do your preferred carrier agreements or marketing agreements contain a condition that the terms and conditions of the agreement are confidential?

Response: Not applicable. See the response to PPA 1-2.

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PPA 1.25 Has the ability to access customers in master planned communities been impeded by the existence of a preferred provider/preferred carrier/marketing agreement between one of your competitors and a property owner/developer?

Response: In the Vistancia master planned community, the initial existence of a preferred provider agreement created financial barriers which prevented Accipiter from constructing network during the normal dry-utility construction window. After Accipiter's Settlement Agreement (reference ACC Docket No. T-03471A-05-0064) our company was able to feasibly construct network within the development within the dry utility window. However, a significant portion of the development had already been built with streets, sidewalks, and homes. Accipiter's costs to construct network among existing streets, sidewalks, landscaping, etc. are very prohibitive and thus impede our ability to access customers in these areas with our network.

As part of the Settlement Agreement, Accipiter does have the opportunity to resell voice services over the CLEC's facilities in the "over-built" portions of the development. However, Accipiter's experience has been that potential customers are not interested in receiving Accipiter's services in this manner.

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PPA 1-26 Other than preferred provider/preferred carrier/marketing agreements, are there other customer access problems in master planned communities?

Response: Accipiter has not experienced access problems outside of the effects of preferred provider/preferred carrier/marketing agreements.

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PPA 1-27 Are there property owners/developers of master planned communities that impose restrictions on your ability to gain access to a right of way? Please describe any such restriction.

Response: Yes, please see Accipiter's response to PPA 1-25.

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PPA 1-28 Does your company utilize preferred provider/preferred carrier/marketing agreements in master planned communities within other states?

Response: No.

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PPA 1-29 Has the use of preferred provider/preferred carrier/marketing agreements in master planned communities been addressed or investigated by any other regulatory agency to your knowledge? If you are aware of any such proceeding, please provide the name of the agency, the docket number of the proceeding, and any other information you may have regarding the status of the case.

Response: Accipiter is aware that in October 2005, the North Carolina Public Utilities Commission ("NCPUC") adopted Rule R20-2 entitled *Fair Competition among Local Telecommunications Service Providers* ("Rule") which addresses preferred provider arrangements. A copy of that Rule, as well as information regarding the NCPUC complaint matter that preceded the Rule's adoption, is set forth in the comments already filed in this Docket by Accipiter Communications, Inc. on March 27, 2007.

More recently, on October 26, 2007, the Florida Public Service Commission issued an Order granting a petition by AT&T for relief from its carrier-of-last resort ("COLR") obligations as a result of a form of preferred provider arrangement that had been entered into between a developer and Comcast. Unlike Arizona, Florida has a statute that permits a local exchange carrier to be relieved of its COLR obligations under certain circumstances. A copy of that Order is attached as **Exhibit C**.

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PPA 1-30 Have there been any court proceedings involving preferred provider/preferred carrier/marketing agreements in master planned communities that you are aware of? If your response is in the affirmative, please provide a case number and cite, if available.

Response: Accipiter filed a Complaint in the Maricopa County Superior Court, styled Accipiter Communications, Inc. v. Cox Arizona Telcom, LLC., *et al*, Cause Number CV2005-010727, filed June 30, 2005, relating to the PPA that existed in the Vistancia master planned community. That suit was dismissed without any further court proceedings as part of the Settlement Agreement that also resolve the Accipiter Formal Complaint filed with the Commission, Docket No. T-03471-05-0064.

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PPA 1-31 Are you aware of any States that have enacted laws concerning the use of preferred provider/preferred carrier/marketing agreements in master planned communities? If yes, please provide a copy of the state laws with your response.

Response: The following statutes/regulations address issues relating to preferred provider/preferred carrier/marketing agreements to varying degrees:

Arkansas Code § 23-17-105

California PUC §626 (2000)

Connecticut Statute § 16-247c & l

Florida Statute § 364.025(6)

Indiana § 8-1-32.6-7 (2006)

Kansas § 58-2553

Louisiana § 45:781

Nevada NAC §704.68098 (1996)

North Carolina §R20-02 (2006)

Oklahoma §165:55-17-30 (2003)

South Carolina §58-9-295

Tennessee §65-21-203

Texas §26.129 (implementing P.U.R.A. §§54.259, 54.260 and 54.261)
(2000)

Copies of the various statutes and regulations are attached as **Exhibit D**.

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PPA 1-32 Do you believe such arrangements should be, or are, unlawful? Please explain your response.

Response: Accipiter believes arrangements between developers and telecommunications companies that exclude competitors directly or that pay others to exclude competition or unduly raise rivals' costs are unlawful.

Accipiter further believes that if these agreements are allowed to be held in secrecy between the developer and telecommunications carrier, the agreements will tend to include unlawful anticompetitive provisions. Therefore we strongly advocate for public disclosure of these agreements.

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PPA 1-33 Are business lines/customers treated differently than residential lines/customers within a master planned community that is under a preferred provider/preferred carrier/marketing agreement? If your response is in the affirmative, please explain how the treatment differs?

Response: The answer to this question would depend upon the terms of the preferred provider or exclusive marketing agreement. Accipiter is aware that Cox employed two separate PPAs with differing terms in the Vistancia development, one for residential and one for business service.

Various versions and copies of those PPAs were filed by Cox in the Accipiter Complaint Docket. As examples, see attached **Exhibits A and B**. Accipiter notes that these executed PPAs included some added provisions relating to private easements, and these PPAs were amended and further modified by the parties thereto, and have now been superseded in accordance with the Settlement Agreement entered in the Accipiter Complaint Docket relating to the Vistancia MPC.

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PPA 1-34 Please provide a sample of all marketing literature distributed by the property owner/developer and your company regarding the provision of telephone service to a master planned community covered by a preferred provider/preferred carrier/ marketing agreement.

Response: Not applicable. See the response to PPA 1-2.

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PPA 1-35 Please provide copies of all unique marketing compensation schedules that were included in final preferred provider/preferred carrier/marketing agreements for all master planned communities served by your company. Each unique marketing compensation schedule should be accompanied with the name of the master planned community for which it applies. (For the purposes of this proceeding, please assume that a marketing compensation schedule is any description of revenue sharing terms and conditions or payments to property owners/developers of master planned communities by providers for services intended to increase or facilitate the penetration of telecommunications products and services.)

Response: Not applicable. See the response to PPA 1-2.

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PPA 1-36 Has your company ever entered into preferred provider/preferred carrier/marketing agreements for master planned communities that included capital contributions provided to your company or an affiliates? (For the purpose of this proceeding, please assume that a capital contribution is any payment of cash, check or bank transfer.) If your response is in the affirmative, please provide the following:

- a. The amount of capital contribution.
- b. The name of the property owner/developer of the master planned community.
- c. The name of the master planned community for which the capital contribution applies.

Response: Not applicable. See the response to PPA 1-2.

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PPA 1-37 Has your company ever engaged in discussions with property owners/developers of master planned communities that included any form of private easement? If your response is in the affirmative, please provide the following:

- a. The timeframe of such discussions.
- b. The name of the property owners/developers involved in such discussions.
- c. The name of the master planned community corresponding to such discussions.
- d. Who initiated such discussions.
- e. Whether or not your company entered into an agreement that included a private easement. If not, please explain why not.

Response: Accipiter was confronted with an existing private easement situation in the Vistancia master planned community and engaged in numerous discussions with the developer relating to understanding what was in place and eventually resulting in the elimination of the private easements as specified in the Settlement Agreement filed in the Accipiter Complaint docket, ACC Docket No. T-03471A-05-0064, and currently pending Commission review in that docket. Other than that Settlement Agreement eliminating private easements, Accipiter has entered into no agreements that include a private easement.

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PPA 1-38 Has your company ever entered into preferred provider/preferred carrier/marketing agreements with property owners/developers of master planned communities that included any form of private easement? If your response is in the affirmative, please provide the following:

- a. The timeframe of such agreements.
- b. The name of the property owners/developers involved in such agreements.
- c. The name of the master planned community corresponding to such agreements.

Response: No.

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- PPA 1-39** Has your company ever engaged in discussions with property owners/developers of master planned communities that included any form of license fees required to provide telecommunications services? If your response is in the affirmative, please provide the following:
- a. The timeframe of such discussions.
 - b. The name of the property owners/developers involved in such discussions.
 - c. The name of the master planned community corresponding to such discussions.
 - d. Who initiated such discussions.
 - e. Whether or not your company entered into an agreement that included license fees. If not, please explain why not.

Response: Accipiter was confronted with an existing private easement situation that included license payments in the Vistancia master planned community and engaged in numerous discussions with the developer relating to understanding the license payments and eventually resulting in the their elimination. See Response to PPA 1-37 above.

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PPA 1-40 Has your company ever entered into preferred provider/preferred carrier/marketing agreements with property owners/developers of master planned communities that included any form of license fees required to provide telecommunications services? If your response is in the affirmative, please provide the following:

- a. The timeframe of such agreements.
- b. The name of the property owners/developers involved in such agreements.
- c. The name of the master planned community corresponding to such agreements.

Response: No.

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PPA 1-41 For each master planned community, from April 1, 1998 to current, in which your company provides telecommunications services but is not or was not the preferred carrier, please provide the following information in excel, spreadsheet, electronic file format. (Each item named below should be taken to represent a column heading in an excel spreadsheet).

- a. The name of the master planned community.
- b. The date when your company initiated service in the master planned community.
- c. The name of the preferred provider/preferred carrier serving the master planned community.
- d. Whether the services are provided via resale, facilities-based or both.
- e. The number of units, homes, main accounts or lines being served by your company in the development.

Response: 1. (a) MPC: Vistancia, (b) March of 2007, (c) Cox Communications (This was after the Settlement Agreement with Accipiter was implemented), (d) facilities based, (e) 18 homes.

2. (a) MPC: Sun City Festival/Festival Foothills, (b) October of 2007, (c) Cox Communications, (d) facilities based, (e) 1 main account.

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PPA 1-42 Do you believe area code boundary changes for master planned communities that cover multiple area codes are in the public interest? If yes, please explain as completely as possible.

Response: Yes. Accipiter has experienced a master planned community split by two area codes. In this community consumers have been frustrated and confused by multiple area codes, even though those area codes may be included within the same local calling area. As an example of the difficulties created in this community, the PBX system within the community's school was initially provisioned incorrectly and failed to translate one of the community's area codes as a local call, therefore calls made from within the school could not complete to the residents located in that particular area code.

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PPA 1-43 Would your company support the elimination of preferred provider/preferred carrier/marketing agreements in master planned communities under any circumstance? If yes, please explain as completely as possible.

Response: No, Accipiter does not support eliminating all forms of preferred provider agreements but believes it is in the public interest to curb anticompetitive practices; that is, agreements erecting artificial barriers to entry. Accipiter advocates that all preferred provider agreements be publicly disclosed and timely filed with the Commission.

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PPA 1-44 Has your company ever considered but not proceeded with filing a complaint before any Commission or taking legal action in matters concerning a preferred provider/preferred carrier/marketing agreement or the provision of services for a master planned community? If yes, please explain:

- a. The name of the master planned community.
- b. The relevant date(s) or timeframe.
- c. Why the company chose not to file a complaint before the Commission or take legal action.

Response: No. Accipiter considered and decided to proceed with a complaint that it filed relating to the PPAs in Vistancia and eventually entered into a settlement in that matter. ACC Docket Number T-03471A-05-0064.

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- PPA 1-45** Has your company ever filed a complaint with any Commission or taken legal action in matters concerning a preferred provider/preferred carrier/marketing agreement or the provision of services for a master planned community? If yes, please provide the following:
- a. The name of the master planned community.
 - b. The date the action or actions were taken.
 - c. A copy of each application filed with the Commission and/or each legal proceeding.

Response: Yes. Accipiter filed a complaint with the Commission in ACC Docket T-03471A-05-0064 regarding the Vistancia master planned community. Since that proceeding was filed with the Arizona Corporation Commission, Accipiter has not attached copies of any documents in that proceeding. Accipiter also filed a Complaint in the Maricopa County Superior Court, styled Accipiter Communications, Inc. v. Cox Arizona Telcom, LLC., *et al*, Cause Number CV2005-010727, filed June 30, 2005, relating to the PPA that existed in the Vistancia master planned community (copy attached as **Exhibit E**). The Superior Court Complaint was also resolved in the same Settlement Agreement that resolved Accipiter's Formal Complaint filed with the Commission.

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ATTACHED EXHIBITS

- A. Co-Marketing Agreement, dated April 8, 2003, (Cox Exhibit TC1 to Direct Testimony, filed April 5, 2006, in ACC Docket No. T-03471A-05-0064. (Example of a residential PPA.)
- B. Property Access Agreement, dated April 8, 2003, (Cox Exhibit TC2 to Direct Testimony, filed April 5, 2006, in ACC Docket No. T-03471A-05-0064. (Example of a commercial PPA.)
- C. Florida Public Service Commission, Order No. PSC-07-0862-FOF-TL, Issued October 26, 2007.
- D. Other State Statutes and Regulations.
- E. Accipiter Communications, Inc. v. Cox Arizona Telcom, LLC., *et al*, Complaint, Cause Number CV2005-010727, filed June 30, 2005.

EXHIBIT A

ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER - CHAIRMAN
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

2006 APR -5 P 4:08

AZ CORP COMMISSION
DOCUMENT CONTROL

IN THE MATTER OF THE FORMAL
COMPLAINT OF ACCIPITER
COMMUNICATIONS, INC., AGAINST
VISTANCIA COMMUNICATIONS, L.L.C.,
SHEA SUNBELT PLEASANT POINT, L.L.C.,
AND COX ARIZONA TELCOM, LLC.

DOCKET NO. T-03471A-05-0064

NOTICE OF FILING

Cox Arizona Telcom, LLC, through undersigned counsel, hereby files the Direct
Testimony of Ivan Johnson, Tisha Christle and Linda Trickey in the above-caption docket.

RESPECTFULLY SUBMITTED this 5th day of April 2006.

COX ARIZONA TELCOM, LLC.

By



Michael W. Patten
ROSHKA DEWULF & PATTEN, PLC
One Arizona Center
400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004

Attorneys for Cox Arizona Telcom, LLC

Original and 13 copies of the foregoing
filed this 5th day of April 2006 with:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

TC-1

Shea Sunbelt Pleasant Point, LLC
&
COXCOM, INC.
CO-MARKETING AGREEMENT

This CO-MARKETING AGREEMENT ("CMA") is entered into this 8 day of April 2003 between COXCOM, INC., a Delaware corporation d/b/a COX COMMUNICATIONS' PHOENIX (hereinafter "Cox") on behalf of itself and its Affiliates (as hereinafter defined in this CMA), Vistancia Communications, L.L.C., an Arizona limited liability company (hereinafter "Access Entity"), and Shea Sunbelt Pleasant Point, LLC, a Delaware limited liability company, (hereinafter "Master Developer").

RECITALS

- A. Whereas the Master Developer is the beneficial owner of and is developing Vistancia, a master planned community of approximately 7,100 acres and some 17,000 planned home-sites, located in the City of Peoria, Arizona ("Peoria"), in accordance with that certain Development and Annexation Agreement executed by Peoria on October 4, 2001 and thereafter recorded in the official records of Maricopa County, Arizona, on October 24, 2001, in Instrument No. 2001-0986718 and the PAD plan and other approvals and entitlements referenced therein and related thereto, as amended from time to time (the "Development").
- B. Whereas the Master Developer desires to make available, through Cox, Technology Facilities and associated Communication Services to provide for the preservation and enhancement of the value of and amenities in the Development. Master Developer will pay Cox a nonrefundable capital contribution of \$3,000,000.00 to deliver said Communication Services at the time of the first home owner occupancy in the initial development phase of Vistancia. Master Developer's payment will be made in four equal payments of \$750,000.00 at the beginning of each quarter beginning April 1, 2003.
- C. Whereas Cox has the legal authority, technical expertise, and the financial resources necessary to install and properly maintain the Technology Facilities and to provide associated Communication Services to residents within Vistancia.
- D. Whereas pursuant to that certain Non-Exclusive License Agreement to be executed by the Access Entity and Cox and recorded in the Office of the Recorder for Maricopa County, State of Arizona in connection with this CMA (the "Non-Exclusive License"), Cox will be granted a non-exclusive license by the Access Entity to provide Cable Television Services to Vistancia, and will also be granted the right under this same license to provide Internet Access Services and Telephone Services to Vistancia residents, including, without limitation, residents of single family and multi-family units upon the occupancy of the first unit built.
- E. Whereas the Master Developer intends to subject all or a portion of the Development to certain easement and access restrictions to facilitate the provision of enhanced technological capabilities, including, but not limited to, those easement and access restrictions set forth in the Common Services Easements and Restrictions to be recorded in the Office of the Recorder for Maricopa County, State of Arizona (the "CSER"). The form of the CSER and the Non-Exclusive License shall be subject to review and approval by Cox prior to recordation thereof, which approval shall not be unreasonably withheld by Cox and shall be deemed given unless Cox delivers to Master Developer its specific written objections to the proposed form of CSER (or Non-Exclusive License, as applicable) within ten days after Master Developer's delivery thereof to Cox. Even though this CMA is being executed by the parties prior to recordation of the CSER, this CMA shall in all events be subject and subordinate to the CSER and the Access Entity's rights thereunder.

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- F. Whereas the Master Developer has formed the Access Entity for the purposes of holding the right to grant access to the easements created for the purpose of providing certain technological capabilities that benefit the residents of Vistancia, including, but not limited to, Communication Services.
- G. Whereas, the Access Entity agrees to grant Cox the Non-Exclusive License.
- H. Whereas the Master Developer anticipates transferring development parcels within (or other portions of) the Development to Neighborhood Builders for the development of subdivisions (referred to herein as "subdivision parcels") and otherwise will seek the cooperation of Neighborhood Builders in the marketing and promotion of the Communication Services provided by Cox within Vistancia.
- I. Whereas this CMA is intended by the parties to apply only to, and this CMA shall apply only to, certain common area tracts owned by a Home Owners Association or Vistancia Maintenance Corporation as hereinafter provided, the SFRs and the MFUs in the Development, and not to any property within the Development that is used for any commercial, retail, industrial, employment center, or other non-residential purpose.

NOW, THEREFORE, in consideration of the mutual covenants contained in this CMA, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Master Developer, Access Entity and Cox agree as follows:

AGREEMENT

- I. Definitions. The following terms shall have the following meanings for all purposes under this CMA:
- (a) "Access Entity" means and refers to Vistancia Communications, L.L.C., an Arizona limited liability company, its successors and assigns.
 - (b) "Activation Ready" means all Technology Facilities that are necessary to provide Communication Services to an SFR or MFU are in place and operational, subject only to being activated upon completion of appropriate subscriber agreements.
 - (c) "Affiliate" shall mean and refer to with respect to any Person (i) any Person directly or indirectly controlling, controlled by or under common control with such Person; (ii) any Person owning, or controlling five percent (5%) or more of the voting securities or voting control of such Person; or, (iii) any Person who is an officer, director, manager, general partner, trustee or holder of five percent (5%) or more of the voting securities or voting control of any Person described in clauses (i) or (ii).
 - (d) "Agreement Date" means the date first set forth in this CMA.
 - (e) "Cable Television Services" means and refers to the transmission to users of video programming or other programming services provided through any Technology Facilities or other Facilities (as defined in the CSER) related to such services, together with such user interaction, if any, which is required for the selection or use of the video programming or other programming services.
 - (f) "CMA" means collectively this Co-Marketing Agreement and any subsequent written amendments and supplements hereto executed by Master Developer and Cox (and by Access Entity, to the extent any such amendments and supplements affect or relate to the obligations or agreements of Access Entity hereunder).
 - (g) "Common Area" means the area of the Development in which marketing material placement created and/or provided by Cox requires prior approval of Master Developer.
 - (h) "Common Service Provider" shall mean and refer to any third party provider of one or more Communication Services and/or utility services.

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- (f) "Communication Services" shall mean and refer to Cable Television Services, Internet Access Services, and Telephone Services, provided or to be provided to or within Vistancia.
- (g) "Contractors" means contractors, subcontractors, material providers and suppliers.
- (h) "Cox" means CoxCom, Inc., a Delaware corporation d/b/a Cox Communications Phoenix, and its permitted successors and assigns.
- (i) "CSER" means the Common Services Easements and Restrictions to be recorded in the Office of the Recorder for Maricopa County, State of Arizona (the form of which shall be subject to review and approval by Cox as provided in Recital E of this CMA), as amended from time to time.
- (j) "Customer Premises Equipment" shall mean Cox-owned, leased or for sale equipment installed within the customer's home to facilitate any of the Communication Services subscribed to, including, but not limited to, converter or set-top boxes, cable modems, digital audio receivers, remote control devices and signal amplifiers.
- (k) "Declarations" shall mean and refer to the Master Declaration, each Village Declaration, and each other declarations of covenants, conditions, easements and restrictions for the Development or any portion thereof as, or to be, recorded in the office of the Maricopa County Recorder in accordance with the Master Declaration and the applicable Village Declaration and which burden the Development or any portion thereof, as each of the foregoing are amended from time to time.
- (l) "Internet Access Services" means the high speed Internet access service Cox provides, currently marketed as 'Cox High Speed Internet'.
- (m) "Marketing and Promotion Program" means the promotional and marketing services and other efforts described in Exhibit C for marketing the Communication Services at Vistancia.
- (n) "Master Developer" means Shea Sabel Pleasant Point, LLC, a Delaware limited liability company, its successors and permitted assigns.
- (o) "MFU" means residential buildings within the Development containing multiple family dwelling units for purchase, lease or rent whether detached or attached.
- (p) "Neighborhood Builder" means any person or entity engaged in the business of constructing SFRs or MFUs for sale to the public, who acquires or otherwise takes legal title from Master Developer to a development parcel, a "super-lot" or platted lots within the Development, for the purpose of developing and construction of one or more SFRs or MFUs thereon.
- (q) "Official Records" means the official records of the Recorder for Maricopa County, Arizona, pertaining to real property.
- (r) "Home Owners Association" means each Village Association, and any other homeowners' or property owners' association that has as its members the owners of SFRs or MFUs in all or any portion of the Development, and is established pursuant to a declaration of covenants, conditions and restrictions recorded in accordance with the Master Declaration and the applicable Village Declaration for the purpose of, among other things, the administration and maintenance of common area tracts within all or any portion of the Development.
- (s) "Master Declaration" means that certain Declaration of Covenants, Conditions and Restrictions for Vistancia to be recorded in the office of the Maricopa County Recorder, as amended from time to time, which among other things, provide for the organization of Vistancia Maintenance Corporation.

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- (u) "Plat" shall mean and refer collectively to all of the recorded subdivision plats and maps of dedication that subdivide the Development and/or dedicate or create streets, roadways or areas to be dedicated to public or private use, as each may be amended from time to time, which include rights of way for dedication to Peoria or other political subdivision with jurisdiction over the Development or the applicable portion thereof, or a subdivision plat recorded by Master Developer or a Neighborhood Builder for the purpose, among other things, of creating one or more legal lots for the development and construction of SFRs and/or MFUs and the sale thereof to members of the home-buying public and which establishes, among other things, streets and/or rights of way (which connect to the major arterial streets and rights of way established under Plat(s) previously recorded) for dedication to private use and/or for dedication to Peoria or other political subdivision with jurisdiction over the Development or the applicable portion thereof, provided, however, that any Plat as described herein shall be subject to the CSER and the Non-Exclusive License.
- (v) "Platted Easement Area" shall mean and refer to all of the drainage, utility and sanitary sewer easement area designated as D.U. & S.S.E. on the Plats, together with the streets (whether public or private) designated on the Plats.
- (w) "Pre-Wire Specifications" means those specifications for installation of inside wiring, outlets and trim in SFRs and MFUs as set forth in Exhibit D, that enable Communication Services to be properly delivered to Cox Customer Premises Equipment.
- (x) "SFR" means a single family detached or attached residence within the Development that is developed for sale, including a condominium or townhouse.
- (y) "Technology Facilities" means all facilities, including, without limitation, on-site and off-site equipment installed for and/or used in the distribution of Communication Services by Cox to Vistancia, including but not limited to equipment cabinets, network interface units, conduit, lines, fiber, wires, cable, pipes, sleeves, pads, cross connect panels, fiber/T1 interfaces, cabling interfaces, patch panels and cords, routers/bridges, fiber transceivers, test equipment, power interfaces, service drop wiring and service laterals and other structures and improvements. The meaning of the term does not include Customer Premises Equipment.
- (z) "Telephone Services" shall mean local and long distance telephone service provided by Cox through one or more affiliates or third parties.
- (aa) "Turnover Date" means (i) as to each Village Association, the date on which the Class B memberships in such Village Association are converted to Class A memberships pursuant to the terms of the Village Declaration pursuant to which such Village Association was established, (ii) as to Vistancia Maintenance Corporation, the date on which Master Developer's voting control of Vistancia Maintenance Corporation (in Master Developer's capacity as Declarant under the Master Declaration) terminates pursuant to the voting provisions of the Master Declaration, and (iii) as to any other Home Owners Association, the date, as provided for in the applicable voting provisions of the declaration of covenants, conditions and restrictions establishing such Home Owners Association, on which the declarant's voting control over such Home Owners Association will terminate.
- (ab) "Unavoidable Delay" means a delay caused by events, circumstances or acts beyond a party's reasonable control. Such events, circumstances or acts may include, without limitation, and only to the extent beyond the affected party's reasonable control and not resulting from such party's failure or inability to fulfill a monetary obligation, an intervening act of God or public enemy, fire, hurricane, storm, adverse weather conditions, flood, earthquake, epidemic, explosion, volcanic eruption, lightning, nuclear radiation, earth slides, geologic or archaeological condition, contamination of soil or groundwater with hazardous materials, loss of power or utilities, power surges, quarantine restriction, freight embargo, act of war (declared or undeclared), riot, public discord, civil disturbance, act or threat of terrorism, sabotage or criminal damage, regulatory delay, litigation challenging the validity of

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enforceability of this CMA, change in law, regulation or policy prohibiting a party from performing its obligations, governmental expropriation of property or equipment, dissolution or disappearance of utilities, carriers or suppliers of unique materials or equipment or materials or equipment having long delivery periods, a failure to meet delivery schedules by any utility or by any carrier or supplier of unique materials or equipment or by any carrier or supplier of materials or equipment having long delivery periods, interruption or casualty in the transportation of materials or equipment or failure or delay by another party in the performance of an act that must be performed before the action that is delayed.

- (cc) "Village Association" means each Village Association as defined in and formed pursuant to the Master Declaration and the applicable Village Declaration therefor.
- (ff) "Village Declaration" means each Village Declaration as defined in and recorded pursuant to the Master Declaration, each as amended from time to time
- (gg) "Vistancia" means the SFRs and MFUs within the Development in Peoria, Arizona, as described in Recital A.
- (hh) "Vistancia Maintenance Corporation" means the Arizona non-profit corporation organized or to be organized pursuant to the Master Declaration, its successors and assigns.

2. Term.

The initial term of this CMA (the "Initial Term") shall be for a period of 20 years, commencing on the Agreement Date. At the end of the Initial Term, this CMA will automatically renew for successive terms of five years each (each such five year term being hereinafter referred to as a "Renewal Term"), unless either party gives written notice of its intent not to renew to the other party at least 90 days prior to expiration of the Initial Term (or the Renewal Term then in effect, as applicable). The Initial Term and Renewal Terms are collectively referred to as the "Term." The Initial Term and any Renewal Term are subject to early termination as provided in Sections 10 and 11 of this CMA.

3. License and Access Rights.

- (a) Development Process. As used herein, the term "Development Process" means the application and processing by the Master Developer of each Plat, the recording of Declarations (including, without limitation, the Master Declaration, the Village Declarations, and all similar Declarations and filings contemplated by the Master Declaration and/or any Village Declaration), the filing of Maps of Dedication, and similar processes customarily utilized in the development of subdivisions; it being further understood that "Development Process" shall include, without limitation, the establishment of Platted Easement Areas along all streets and thoroughfares, together with such additional locations as may be reasonable or expedient in carrying out the intent of this CMA and the Non-Exclusive License.
- (b) Grant of Non-Exclusive License. The Access Entity and Cox agree to execute and record the Non-Exclusive License promptly (and in all events within 20 days) following recordation of the CSER (in the form approved by Cox as provided in Recital E). The parties agree that notwithstanding any contrary provision of this Non-Exclusive License, the following terms shall apply to the license and other rights granted to Cox pursuant to the Non-Exclusive License:
 - (i) Neither the construction and installation nor the repair, replacement and maintenance of Technology Facilities by Cox shall unreasonably interfere with the development of the subdivision or with the use or enjoyment thereof by any Neighborhood Builder or subsequent owner of an SFR or MFU located within such subdivision.

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(ii) Except for an emergency threatening damage to any property or injury to any person, in no event shall any holder or beneficiary of any rights granted under the Non-Exclusive License have the right to enter (by virtue of the Non-Exclusive License or otherwise) upon any portion of a lot on which an SFR or MFU is constructed (except such portion as may be within the public right of way) after the first conveyance of such SFR or MFU to a buyer or other transferee who is entitled to receive by reason of such conveyance a subdivision public report pursuant to the Arizona Revised Statutes §32-2183, §32-2195.03 or any similar statute hereafter in effect without the prior consent of the then current owner of such SFR or MFU.

(iii) Notwithstanding any other provision hereof, in no event shall any holder or beneficiary of any rights granted under the Non-Exclusive License have the right to enter (by virtue of the Non-Exclusive License or otherwise) into the interior of any SFR or MFU or any structure related thereto and located thereon without the prior consent of the then current owner thereof.

(iv) During the Development Process, the Master Developer shall establish and delineate Platted Easement Areas, which shall be subject to the rights granted to Cox in the Non-Exclusive License. Notwithstanding any provision to the contrary, the Master Developer will also establish and delineate areas in which easements, licenses or similar rights may be granted either by operation of law, by express grant from the Master Developer and/or the Access Entity or any of their respective designees, or pursuant to the CSER and the Non-Exclusive License; provided, however, that such establishment and delineation shall not erode or lessen the rights conveyed under the CSER or the Non-Exclusive License. Master Developer, the Access Entity and Cox acknowledge and agree that the intent of this Section 3 and the Non-Exclusive License is to provide Cox with physically continuing easements, licenses and access rights throughout Vistancia, which allow Cox to reach each SFR and MFU within Vistancia in accordance with the terms of this CMA. In the event that the provisions of this Section 3 are not sufficient to accomplish this, Master Developer and the Access Entity shall grant or cause to be granted to Cox such additional, perpetual, non-exclusive easement rights or rights of access as are reasonably necessary to fulfill the intent of this Section 3, including, without limitation, any necessary easements or rights of access between non-contiguous Plats. In the event that Master Developer (and/or the Access Entity, as applicable) is unable or unwilling to provide the additional easements or access rights referenced in the immediately preceding sentence, Cox may, in its sole discretion and in addition to any other rights it may have, (i) seek specific performance of Master Developer's (and/or the Access Entity's, as applicable) obligations hereunder and/or (ii) require Master Developer (and/or the Access Entity, as applicable) to reimburse Cox for the actual cost (plus reasonable expenses) of acquiring such easement rights.

(v) Cox shall not unreasonably interfere with the use of the Platted Easement Areas by other providers of services or utilities, except as contemplated by the CSER and the Non-Exclusive License. Specifically, it is understood by Cox that sanitary sewer, storm sewer, natural gas, electricity, and other similar utility services may coexist with Cox in the Platted Easement Areas; and, further, that the Non-Exclusive License is non-exclusive and the Platted Easement Area may be utilized by other, even competitive, Common Service Providers as contemplated by the CSER, this CMA and the Non-Exclusive License.

(c) Pre-Wire Specifications. Master Developer shall include in its contracts with Neighborhood Builders, as contemplated by subsection 6(b), the language regarding compliance with Pre-Wire Specifications set forth in item (b) of Exhibit A; provided, however, that if the Neighborhood Builder will not agree to such provision, then (i) Master Developer shall be permitted to delete such item (b) from its contract with the Neighborhood Builder, (ii) thereafter Master Developer shall work with Cox to obtain the agreement of such Neighborhood Builder to comply at its expense with the Pre-Wire Specifications in the construction of each SFR and MFU, as set forth in item (b) of Exhibit A, and (iii) Cox will bear the ultimate responsibility and cost of securing such agreement with the Neighborhood Builder.

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(d) Post-CMA Closings. As to subdivisions or parcels of property within the Development that have already been sold to Neighborhood Builders and/or are in escrow to be sold as of the Agreement Date, Master Developer agrees to use its diligent, good faith efforts to cause those Neighborhood Builders to comply with the applicable provisions set forth in subsection 3(c).

(e) Repair of Improvements. Cox shall promptly repair and restore (to their condition existing immediately prior to such use by Cox, exclusive of normal wear and tear) any on-site or off-site improvements that are damaged or destroyed in connection with or arising from any use by Cox of the rights granted to Cox pursuant to this CMA and/or the Non-Exclusive License.

1. Communication Services & Technology Facilities Obligations of Cox.

(a) Preferred Right to Offer Communication Services. During the Term of this CMA, Cox shall have the preferred right to market and offer the Communications Services (including future technology comprising all or part of the Communication Services as it becomes available) to residents of SFRs and MFUs in the Development, which preferred right shall apply only (i) within any model home operated by a Neighborhood Builder that purchases any portion of the Development from Master Developer, and (ii) within any common area tract owned by a Home Owners Association or Vistancia Maintenance Corporation and made available by Master Developer for the marketing of Communication Services, provided that Cox's preferred right with respect to any such common area tract shall terminate upon the Turnover Date for the Home Owners Association (or Vistancia Maintenance Corporation, as applicable) that owns such common area tract. In addition, Cox shall have the preferred right to provide Communication Services to each model home office in Vistancia operated by a Neighborhood Builder that purchases any portion of the Development from Master Developer. Master Developer's only obligation in connection with the provisions of this subsection (a) relating to model homes and model home offices shall be to include the provisions set forth in Exhibit A in purchase agreements and option agreements as provided in subsection 6(b) of this CMA, it being specifically acknowledged and agreed by Cox that (i) Master Developer does not and cannot control the use or operation of any such model home or model home office, by a Neighborhood Builder, and (ii) all obligations of Master Developer under this subsection (a) relating to model homes and model home offices of each Neighborhood Builder to whom it sells any portion of the Development shall be fully satisfied if Master Developer includes language substantially in the form of Exhibit A in its purchase agreement or option agreement with such Neighborhood Builder. Notwithstanding the foregoing, the Master Developer shall pay to Cox, upon acceptance of this CMA, a nonrefundable payment in the sum of Three Million and No/100 Dollars (\$3,000,000.00), to be used by Cox for the cost of the installation of Technology Facilities for Cox to offer Communication Services at the initial phase of the Development (consisting of Village A and Trilogy). Cox shall be required to provide the Communication Services to residents of the initial phase of the Development upon occupancy of the first home in that phase. Master Developer's payment will be made in four equal installments of Seven Hundred Fifty Thousand and No/100 Dollars (\$750,000.00) each at the beginning of each quarter, commencing April 1, 2003.

(b) Future Effect of CMA. Notwithstanding any contrary provision of this CMA, this CMA (including, but not limited to, the preferred right granted to Cox under subsection 4(a) and the exclusive rights granted to Cox under Section 5) shall not be binding upon (i) any Home Owners Association or common area tract within the Development owned by any such Home Owners Association, following the Turnover Date for such Home Owners Association, (ii) Vistancia Maintenance Corporation or common area tract within the Development owned by Vistancia Maintenance Corporation, following the Turnover Date for Vistancia Maintenance Corporation, or (iii) any owner of any portion of the Development, other than any Neighborhood Builder that purchases any portion of Vistancia from Master Developer (to the extent provided in subsection 6(b)) and Master Developer. Without limiting the generality of the foregoing, Cox specifically agrees and acknowledges that the preferred right granted to Cox under subsection 4(a) and the exclusive rights granted to Cox under Section 5 may terminate at such time as Neighborhood Builders that purchased property within the Development from Master Developer are no longer operating model homes in the Development. The compensation as set

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forth in Exhibit G (the "Marketing Compensation") will be paid to Master Developer for Master Developer's exclusive marketing and sales efforts on behalf of Cox. So long as Master Developer maintains a majority vote in the Vistancia Maintenance Corporation, Cox will continue to pay Master Developer the above mentioned Marketing Compensation. Upon the Turnover Date for Vistancia Maintenance Corporation, this CMA shall be assigned by Master Developer in its entirety to the Vistancia Maintenance Corporation, and as long as the Vistancia Maintenance Corporation (acting in its own capacity and/or through one or more Village Associations) continues to perform the exclusive marketing obligations contained herein in conformance with the provisions herein, Cox shall pay the compensation for the remainder of the Term to the Vistancia Maintenance Corporation.

- (c) **Cox Obligation to Provide Communication Services.** Cox agrees to make available, at a minimum, the following Communication Services to such phases, portions or subdivision parcels of the Development as are sold for development to Neighborhood Builders, or to other parties, through escrows that close during the Term of this CMA, which Communication Services shall be provided by Cox in accordance with the standards set forth in Exhibit E:
- (i) **Cable Television Services.** Subject to legal and regulatory constraints, Cable Television Services for each resident of any SFR or MFU that subscribes for such service; provided that Cox shall be entitled to cause such service to be provided directly or by or through a parent, subsidiary or Affiliate of Cox.
 - (ii) **Service Standard & Upgrades.** Cox shall upgrade the Cable Television Services within a reasonable time at no cost to Master Developer, any Neighborhood Builders, any Home Owners Association, or Vistancia Maintenance Corporation, to deliver a level of service that equals or exceeds the services being offered by substantially similar providers of such cable television services within the metropolitan statistical area of the community. If and when other products become commercially available, Cox will incorporate such future technology services into the bundle of Communication Services being offered to Vistancia residents thereof, when it is technically, economically and operationally feasible to do so.
 - (iii) **Telephone Service.** Subject to legal and regulatory requirements and availability of telephone numbers, Cox shall offer Telephone Service to each resident of any SFR or of any MFU that subscribes for such service; provided that Cox shall be entitled to provide such service by or through a parent, subsidiary or Affiliate of Cox, including but not limited to Cox Arizona Telecom, LLC; and provided further that Cox shall have access to buildings as necessary to provide the service.
 - (iv) **Internet Access Service.** Subject to legal and regulatory constraints, Cox shall provide Internet Access Service for each resident of any SFR or MFU that subscribes to such service; provided that Cox shall be entitled to cause such service to be provided by or through a parent, subsidiary or Affiliate of Cox.
 - (d) **Cox Obligation to Provide Technology Facilities.** Cox agrees to construct, provide, install, repair, replace and maintain all Technology Facilities required in order to provide the Communication Services to SFRs and MFUs within the Development at its sole cost and expense, provided that the Technology Facilities will be installed and provisioned over time, on a phased-in basis during the initial Term of this CMA, so long as the Communication Services can be provided to each SFR and MFU upon initial occupancy thereof.
 - (e) **Design & Installation Conditions.** Cox shall design and install the Technology Facilities (exclusive of the Pre-Wiring in the SFRs and MFUs which shall be the responsibility of the applicable Neighborhood Builders) in accordance with system architecture and schematic plans set forth in Exhibit B for those phases or portions of the Development in which Cox receives the access rights and interests contemplated under Section 3 of this CMA. However, Cox shall have no obligation to install the

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Technology Facilities or delivers the Communication Services to any phase or portion of the Development in which Master Developer or the applicable Neighborhood Builder has not, at its own expense; (1) constructed any buildings or structures required by Master Developer or the applicable Neighborhood Builder in which any Technology Facilities will be located; (2) performed the excavation, opening and closing (subject to the provisions of subsections 6(c) and 7(b)) of joint trenches to accommodate Cox's Technology Facilities on or serving such phase or portion of the Development (limited, in the case of trenches in the right of way dedicated to Peoria or other applicable governmental authority, to such Technology Facilities as Cox is permitted by such governmental authority, the CSEB and Non-Exclusive License to install in such trenches), which joint trenches shall conform to the route and specifications provided by the APS plans for such trenches (it being agreed that any additional trenching beyond the APS route and specifications that may be necessary to accommodate Cox's Technology Facilities shall be in accordance with the Western States joint Trench Formula and shall be the responsibility of Cox and other utility companies in the trench as provided in subsection 6(e) and not the Master Developer or Neighborhood Builder; (3) installed the pre-wiring in all SFRs and MFUs in compliance with the Pre-Wire Specifications attached as Exhibit D; (4) provided to Cox, without charge, access to any building utility closets or rooms, related HVAC systems, foundation sleeves and pre-wiring (per the Pre-Wiring Specifications attached in Exhibit D) for all applicable SFRs, MFUs, and buildings; and (5) with respect to any portion of Vistancia conveyed to a Neighborhood Builder prior to the execution of this CMA, had all pre-wiring installed by the Neighborhood Builder reviewed and accepted as in compliance with the Pre-Wire Specifications.

- (f) **Selection of Contractors.** Cox shall select the Contractors to be used for installation of the Technology Facilities to be installed by Cox. Cox shall give written notice to Master Developer and the applicable Neighborhood Builder of the selection of Cox's Contractors and Cox will be responsible for providing such Contractors with plans, specifications and design detail for all Technology Facilities Cox installs.
- (g) **Construction & Installation.** Cox shall be solely responsible for providing, placing, constructing and installing the appropriate Technology Facilities, as necessary to provide the full range of Communication Services (subject to legal and regulatory restraints), in accordance with applicable law.
- (h) **Approvals, Permits & Compliance.** Cox shall be solely responsible for the following with respect to all work performed by Cox or its contractors, agents or employees: all reasonable and legally required consents, approvals, applications, filings, permits, licenses, bonds, insurance, inspections, construction, labor, material, equipment, tools, safety compliance, quality/ standards compliance, and compliance with all applicable laws, rules and ordinances.
- (i) **Ownership and Maintenance.** Cox at all times shall retain title to and control of the Technology Facilities. The Technology Facilities, or any portion thereof, shall not be considered fixtures, but the personal property of Cox (unless otherwise stipulated to in writing to Cox). Upon termination of this CMA, Cox shall retain title to and control of the Technology Facilities and, at its option, may either remove the Technology Facilities from the Development or leave such Technology Facilities in place at its own cost and expense. Cox shall operate, repair, replace and maintain all Technology Facilities at its own cost and expense.
- (j) **Early Termination Upon Cessation of Service.** In the event that Cox is unable to or is otherwise prevented from providing any of the Communication Services by legal or regulatory constraints, Master Developer shall have the right to terminate this CMA, in applicable part or in whole, as provided in Section 11, but shall not have the right to seek remedies of specific performance or damages for default.
- (k) **Individual Subscriber Basis.** Unless this CMA is amended in writing, the Communication Services provided by Cox under this CMA will be provided on an individual subscriber basis. The terms and

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conditions in the subscriber agreement regarding charges for Communication Services and Customer Premises Equipment (including as to the amount of any deposit, advance payment, rental or purchase of associated Customer Premises Equipment and installation or hookup fees) shall be the same as are generally available from Cox in Peoria and the area of the City of Peoria adjacent to Vistancia and/or as set forth in Cox's tariffs for local exchange as set forth with the Arizona Corporation Commission.

- (p) **Billing Subscribers.** Cox will be responsible for billing subscribers for the Communication Services. Cox shall not look to or otherwise hold the Master Developer, any Neighborhood Builder, any Home Owners Association, or Vistancia Maintenance Corporation liable or responsible in any manner for payment of individual subscriber fees or related costs (except fees for Communication Services provided directly to Master Developer, any Neighborhood Builder, any Home Owners Association or Vistancia Maintenance Corporation as a subscriber will be the responsibility of such subscriber). Cox reserves the right to terminate Communication Services to any subscriber who does not timely pay billed amounts or who otherwise fails to abide by the terms and conditions of its subscriber agreement.
- (n) **Model Home Service.** Cox shall make available in one main model home per Neighborhood Builder and the project information center (as designated by Master Developer), at Cox's sole cost and expense:
- (i) **Digital Cable Television Service.** One "complimentary" (non-chargeable) digital Cable Television Service account (with Pay Per View and all premium paid services blocked) to a television provided by the Neighborhood Builder in the model home (until such model home is sold to an individual homebuyer), and to a television provided by Master Developer in the information center;
- (ii) **Cox High Speed Internet Demo.** One "complimentary" (non-chargeable) Cox High Speed Internet demo to a computer provided by the Neighborhood Builder (until such model home is sold to an individual homebuyer), and to a computer provided by the Master Developer in the information center;
- (iii) **Signage at Point of Delivery.** Appropriate recognition of the benefit provided by Cox shall be given by way of reasonably visible signage provided by Cox at each point of delivery within the model home (with the size and location of same to be established by the reasonable mutual agreement of Cox and each Neighborhood Builder) and within the information center (with the size and location of same to be established by the reasonable mutual agreement of Cox and Master Developer).

5. **Exclusive Marketing Rights and Marketing Incentive Fees.**

(a) **Exclusive Rights of Cox. During the Term of this CMA:**

- (i) **Endorsement by Master Developer.** Master Developer shall endorse Cox exclusively as the preferred provider of the Communication Services to Vistancia;
- (ii) **Marketing and Promotion of Communication Services.** Master Developer hereby grants to Cox the exclusive right to market and promote the Communication Services in Vistancia, which exclusive right shall apply only (i) within any model home operated by a Neighborhood Builder that purchases any portion of the Development from Master Developer, and (ii) within any common area tract owned by a Home Owners Association or Vistancia Maintenance Corporation and made available by Master Developer for the marketing of Communication Services, provided that Cox's preferred right with respect to any such common area tract shall terminate upon the Turnover Date for the Home Owners Association (or Vistancia Maintenance Corporation, as applicable) that owns such common area tract. Master Developer's only obligation in connection with the provisions of this subsection (ii) relating to

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model homes shall be to include the provisions set forth in Exhibit A in certain purchase agreements and option agreements as provided in subsection 6(b) of this CMA, it being specifically acknowledged and agreed by Cox that (A) Master Developer does not and cannot control the use or operation of any such model home by a Neighborhood Builder, and (B) all obligations of Master Developer under this subsection (a) relating to model homes of each Neighborhood Builder to whom it sells any portion of the Development shall be fully satisfied if Master Developer includes language substantially in the form of Exhibit A in its purchase agreement or option agreement with such Neighborhood Builder.

(iii) Similar Agreements and Co-Branding. Master Developer and the Access Entity shall not enter into any arrangements similar to this CMA, or endorse or engage in promotional or marketing activities of any kind by or for the benefit of any other provider of Communication Services within Vistancia that are equivalent to the Communication Services, excepting only communication services that Cox elects not to or is incapable of providing and otherwise as expressly provided herein. Without limiting the foregoing, Master Developer and the Access Entity shall not enter into any agreement which permits the co-branding of the intranet home page or any advertising on the community pages by any provider of technology services within Vistancia that are equivalent to any of the Communication Services (including any Internet provider or gateway) other than Cox High Speed Internet (residential or commercial).

(iv) Master Developer and the Access Entity will not, either jointly or severally, directly or indirectly, extend to any person access to Vistancia for the purpose of providing any Communication Services under terms or conditions of access that: (a) provide for marketing compensation which, in the aggregate, allows a lower payment than is provided for Marketing Compensation under this CMA as set forth in Exhibit G (including, without limitation, amendments or supplements thereto, which may subsequent to the date of this CMA), or (b) provides for any marketing compensation which taken individually (as to an individual SFR or MFU) allows a lower percent payment than is provided for Marketing Compensation under this CMA as set forth in Exhibit G (including, without limitation, amendments or supplements thereto, which may subsequent to the date of this CMA), or (c) allow for the provision of any service of a lesser quality than is being offered by Cox pursuant to this CMA. Cox, Master Developer and the Access Entity acknowledge and agree that the rights in this section and other provisions in this CMA are intended to create a level playing field for all Communication Services providers, and not to provide discounts or competitive advantages to Cox.

(b) Cox Marketing and Promotion Effort. Cox shall undertake to market and promote the Communication Services in an effective and diligent manner, all in accordance with the Marketing & Promotion Program set forth in Exhibit C.

(c) Marketing Compensation. Cox shall pay to Master Developer a Marketing Compensation as set forth in Exhibit G, during the Term of this CMA; provided no Marketing Compensation shall be payable after termination of this CMA with respect to any Communication Service that is the subject of such termination except for Marketing Compensation accrued in respect of such Communication Service(s) but unpaid as of the date of such termination.

(d) Reporting by Neighborhood Builders. During the Term of this CMA, Master Developer shall encourage the Neighborhood Builders to (i) deliver to Cox by the fifteenth day of each month a report of the identity of all buyers who have closed escrow for purchase of SFRs or MFUs during the prior month, and the respective dates of closing, and (ii) deliver to Cox any updates to such report on the last day of the month. To the extent any such report is not provided by a Neighborhood Builder, Master Developer shall provide such report, if requested to do so by Cox, but only to the extent such information is obtainable by Master Developer without additional cost or expense.

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- (e) **Master Developer Audit Rights.** Within one year following Master Developer's receipt of any payment of Marketing Compensation, Master Developer shall have right to audit the books and records of Cox regarding the value of consumer subscription to Communication Services for the period covered by such payment of Marketing Compensation to verify the amount of Marketing Compensation due. All audits shall be conducted during normal business hours and upon reasonable prior written notice to the party being audited. All audits shall be conducted at the office in Arizona where the party being audited maintains the records to be audited. No records shall be removed from such offices by the auditor. Unless required by law or court order or as evidence in any dispute resolution proceedings, the auditing party shall not disclose any non-public information obtained in course of the audit. If as a result of an audit it is determined that any amount owing has been underpaid by more than 5%, the audited party shall reimburse the auditing party for the reasonable cost of the audit.

6. **Technology Facilities Cooperation & Coordination by Master Developer.**

- (a) **Cooperation by Master Developer.** Master Developer shall cooperate and coordinate with Cox in the design, permitting, construction and installation of the Technology Facilities described in Exhibit B and shall establish and implement procedures to facilitate the orderly and efficient design, permitting and construction of the Technology Facilities in all phases of development of Vistancia during the Term of this CMA.
- (b) **Required Neighborhood Builder Provision.** Master Developer shall include provisions in substantially the form of Exhibit A attached hereto in each purchase agreement or option agreement entered into by Master Developer and a Neighborhood Builder during the Term of this CMA pursuant to which property within the Development is conveyed to such Neighborhood Builder for development with SFRs. Master Developer shall cooperate with Cox to the extent enforcement of the Neighborhood Builder's obligations under such provision is required; provided, however, that Master Developer shall not be a required party to any suit or arbitration initiated by Cox seeking to enforce any such Neighborhood Builder obligation. As to property within the Development that has already been sold to Neighborhood Builders and/or is in escrow to be sold as of the Agreement Date, Master Developer agrees to use its reasonable, good faith efforts to cause such Neighborhood Builders to agree to the provision set forth in Exhibit A. Notwithstanding any contrary provision of this CMA, Master Developer shall not be responsible or liable for any breach or default by a Neighborhood Builder of its obligations under any provision in Exhibit A, and in no event shall a breach or default by a Neighborhood Builder of its obligations under any provision in Exhibit A constitute a default by Master Developer under this CMA.
- (c) **Cooperation in Use of Technology Easements and Similar Use Right Areas.** Master Developer shall cooperate with Cox, at Cox's cost and expense, in Cox's efforts to obtain the non-exclusive right to utilize easements or similar use right areas established pursuant to Plats processed by Master Developer in respect of Vistancia.
- (d) **No Obligation of Cox to Build Sales Centers or Structures.** Cox shall not be obligated to construct or pay for any sales centers or other structures that are constructed or erected for the purpose of displaying Cox marketing materials, as required of Master Developer (as to common area tracts prior to the Turnover Date thereof) and/or any Neighborhood Builder (as to model homes) in which Technology Facilities are constructed, provided, installed, replaced, repaired and maintained under this CMA.
- (e) **Cox Trenching Obligations.** Unless otherwise provided for under this CMA or otherwise due to the failure of Cox to comply with the terms and provisions of this CMA, Cox shall not be obligated, except as provided for in this subsection 6(e), to perform or pay for the excavation, opening or closing of any joint trench on or serving any portion of Vistancia, or provide installation of the building sleeves from the joint trenches to any building, all of which shall be and remain solely the responsibility of Master

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Developer and/or the applicable Neighborhood Builder(s). Cox will provide, at its sole cost and expense, the conduits and drop cables to be installed by each Neighborhood Builder in its subdivision. Notwithstanding any contrary provision hereof, if Cox determines that any trenching is necessary to accommodate Cox's Technology Facilities that is wider than, deeper than, or otherwise beyond or different from the APS route and specifications (such trenching being hereinafter referred to as "Additional Trenching"), then Cox shall reimburse to Master Developer (or the applicable Neighborhood Builder, if it installs the Additional Trenching) a proportionate share of the cost thereof. Cox shall provide notice to Master Developer and the applicable Neighborhood Builder of the need for any Additional Trenching prior to Master Developer's (or the Neighborhood Builder's, as applicable) commencement of construction of the trench that requires any such Additional Trenching. Cox will pay the cost of Additional Trenching based on the Western States Joint Trench Formula.

7. Technology Facilities Cooperation & Coordination by Cox.

- (a) Installation of Technology Facilities. Cox shall (i) cooperate and coordinate with Master Developer and the applicable Neighborhood Builders in the design and construction of the Technology Facilities described in Exhibit B for those portions of Vistancia that are sold by Master Developer for development of SFRs to Neighborhood Builders through escrows that close during the Term of this CMA, (ii) commence and complete its design, construction and installation obligations in a timely and effective manner, in accordance with Master Developer's (or the Neighborhood Builder's as applicable) construction schedule for a particular subdivision parcel or neighborhood, and (iii) keep Master Developer and the applicable Neighborhood Builder fully and timely informed throughout the course of design and construction. Without limitation of the foregoing, Cox shall make the design for the Technology Facilities for any given subdivision parcel or neighborhood, as applicable, available to Master Developer and, if applicable, the Neighborhood Builder upon completion; provided, however, that in all events Cox must make such design available in sufficient time to accommodate Cox's design within the plans/design for the trench in which the applicable Technology Facilities will be installed. Master Developer and, if applicable, the Neighborhood Builders, shall have five business days to discuss the design with Cox so that the planning and progress of Vistancia or such subdivision will not be interrupted or adversely impacted.
- (b) Timely Delivery of Plans. At all times during the Term of this CMA, and at all relevant times thereafter, Cox will provide to Master Developer or the applicable Neighborhood Builder wiring routing plans for all Technology Facilities that Cox intends to construct and install at the Development or the applicable subdivision parcel sufficiently in advance of such planned construction and installation of Technology Facilities so as to permit and facilitate timely and cost-effective coordination and cooperation by the respective parties in the performance of the development work to be performed by each. Master Developer and/or any Neighborhood Builder shall provide no less than ten (10) business days notice to Cox of the final date for installation of Technology Facilities within any trench constructed by Master Developer or such Neighborhood Builder. So long as the foregoing notice has been provided, in no event shall Master Developer or any Neighborhood Builder be required or obligated to re-open a completed trench to accommodate the installation of any Technology Facilities, which re-opening shall be the sole responsibility and expense of Cox.
- (c) Governmental Permits. Cox will be responsible for obtaining all governmental permits and licenses, zoning variances and other governmental approvals, at Cox's sole cost and expense, that are required for the construction and installation of the Technology Facilities by Cox.
- (d) Warranty. Cox makes no warranty, expressed or implied, as to the design or construction of the Technology Facilities, except that Cox represents and warrants that the Technology Facilities installed by Cox:
 - (i) Are owned by Cox without the right of any other person or party to remove or alter the same;

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(ii) Shall provide the Communication Services and otherwise satisfy the operating specifications and parameters set forth in this CMA.

(c) **Construction Manager.** Cox shall appoint a manager to act as a single point of contact for coordination and cooperative implementation of procedures for resolving day-to-day construction issues within Vistancia.

(f) **Marketing of Apartment Parcels.** Cox will cooperate with Master Developer during the Term to present to potential purchasers of apartment parcels and developers of MFUs a selection of arrangements for the provision of Technology Facilities and Communication Services to such properties. Such arrangements may include, but not be limited to, an offering of bulked services at discounted rates, if allowed by law, or an offering of consideration to the purchaser/developer in exchange for exclusive marketing rights. Developer shall use its reasonable efforts to include Cox in discussions with any such potential purchaser/developer of an apartment or other MFU parcel, in order for Cox to present such selection and initiate direct discussions and negotiations thereof with the potential purchaser/developer.

8. **Insurance; Indemnification; Waiver of Subrogation.**

(a) **Required Insurance.** During the Term of the CMA, Cox and Master Developer each shall maintain insurance satisfying the requirements of Exhibit F.

(b) **Damage or Destruction by Master Developer.** In the event that Master Developer its agents shall negligently or willfully damage or destroy any Technology Facilities owned by Cox in connection with or arising from the construction or installation of any on-site or off-site improvements, then Master Developer shall reimburse Cox for the cost and expense of repairing the same.

(c) **Damage or Destruction by Cox.** In the event that Cox its agents shall negligently or willfully damage or destroy any on-site or off-site improvements in connection with or arising from the construction or installation of any Technology Facilities, then Cox shall reimburse Master Developer for the cost and expense of repairing the same.

(d) **No Liability for Computer Damage.** Notwithstanding any contrary provision in this CMA, in no event shall Cox or Master Developer be liable to the other party for any loss, recovery or restoration of any electronically generated or stored data or for damage to computer or any other technology-related equipment of any such person or entity or any loss of income or revenue resulting therefrom.

(e) **Waiver of Subrogation.** Notwithstanding any contrary provision of this CMA, each party to this CMA hereby waives all rights that it may have against the other to recover for any loss arising out of or incident to occurrence of the perils covered by property and casualty insurance that is required to be carried by each party hereto pursuant to subsection (a), notwithstanding the amount and type of such insurance coverage elected to be carried by such party hereunder or whether or not such party has elected to be self-insured in any amount or to any extent, except with respect to the reimbursement provisions of subsections (b) and (c) above to the extent not covered by insurance; and the parties hereto acknowledge and agree that the intent of this provision is to eliminate any risk of loss or liability to any party who may have caused or created to the detriment of the other party any loss or liability which would have been covered by property insurance and liability insurance if such other party had obtained such insurance coverage (or an adequate amount thereof) in lieu of self-insurance or an inadequate amount of, or coverage under, such insurance) except as noted with respect to subsections (b) and (c).

9. **Representations and Warranties**

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(a) By Master Developer. Master Developer hereby represents and warrants to Cox as follows:

- (i) **Organization and Authority.** Master Developer is a duly organized limited liability company created under the laws of the State of Delaware, is qualified to engage in business in the State of Arizona, has the requisite power and all required governmental approvals to carry on its present and proposed activities, and has full power, right and authority to enter into this CMA and to perform each and all of the obligations of Master Developer provided for herein and therein.
- (ii) **Due Execution.** Each person who, in the name of Master Developer, executes this CMA has been duly authorized to execute this CMA on behalf of Master Developer.
- (iii) **No Conflict.** Neither the execution and delivery by Master Developer of this CMA, nor the consummation of the transactions contemplated hereby, is at the time executed in conflict with the governing instruments of Master Developer or any other agreements or instruments to which it is a party or by which it is bound; and as of the Agreement Date, and without otherwise limiting or qualifying the other representations, warranties and covenants of Master Developer under this CMA, the executive management of Master Developer has no knowledge of any written notice asserting a claim that might reasonably be expected to materially impair the use of the Communication Services.
- (iv) **No Litigation.** There is no litigation served on Master Developer, which challenges Master Developer's authority to execute, deliver or perform this CMA, and the executive management of Master Developer has no knowledge of any threatened litigation with respect to such matters.
- (v) **Compliance with Law.** Master Developer is in material compliance with all laws and regulations applicable to Master Developer's activities in connection with this CMA.
- (vi) **No Conflicting Rights.** Master Developer has granted no exclusive or equivalent rights to any other provider of Communication Services within Vistancia that are comparable to Cox's preferred provider status with respect to the Communication Services hereunder, prior to the Agreement Date.

(b) By Cox. Cox hereby represents and warrants to Vistancia as follows:

- (i) **Organization and Authority.** Cox is a duly organized corporation created under the laws of the State of Delaware, is qualified to engage in business in the State of Arizona, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to enter into this CMA and to perform each and all of the obligations of Cox provided for herein and therein.
- (ii) **Due Authorization.** Cox has taken or caused to be taken all requisite corporate action to authorize the execution and delivery of, and the performance of its obligations under, this CMA.
- (iii) **Due Execution.** Each person who, in the name of Cox, executes this CMA has been duly authorized to execute this CMA on behalf of Cox.
- (iv) **No Conflict.** Neither the execution and delivery by Cox of this CMA nor the consummation of the transactions contemplated hereby is at the time executed in conflict with the governing instruments of Cox or any other agreements or instruments to which it is a party or by which it is bound, and as of the Agreement Date, and without otherwise limiting or qualifying the other representations, warranties and covenants of Cox under this CMA, the executive management

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of Cox has no knowledge of any written notice asserting a claim that might reasonably be expected to materially impair the use of the Communication Services.

(v) **No Litigation.** There is no litigation served on Cox, which challenges Cox's authority to execute, deliver or perform this CMA, and the executive management of Cox has no knowledge of any threatened litigation with respect to such matters.

(vi) **Compliance with Law.** Cox is in material compliance with all laws and regulations applicable to Cox's activities in connection with this CMA.

(c) **By Access Entity.** Access Entity hereby represents and warrants to Cox as follows:

(i) **Organization and Authority.** Access Entity is a duly organized limited liability company created under the laws of the State of Arizona, is qualified to engage in business in the State of Arizona, has the requisite power and all required governmental approvals to carry on its present and proposed activities, and has full power, right and authority to enter into this CMA and to perform each and all of the obligations of Access Entity provided for herein and therein.

(ii) **Due Execution.** Each person who, in the name of Access Entity, executes this CMA has been duly authorized to execute this CMA on behalf of Access Entity.

(iii) **No Conflict.** Neither the execution and delivery by Access Entity of this CMA, nor the consummation of the transactions contemplated hereby, is at the time executed in conflict with the governing instruments of Access Entity or any other agreements or instruments to which it is a party or by which it is bound; and as of the Agreement Date, and without otherwise limiting or qualifying the other representations, warranties and covenants of Access Entity under this CMA, the executive management of Access Entity has no knowledge of any written notice asserting a claim that might reasonably be expected to materially impair the use of the Communication Services.

(iv) **No Litigation.** There is no litigation served on Access Entity, which challenges Access Entity's authority to execute, deliver or perform this CMA, and the executive management of Access Entity has no knowledge of any threatened litigation with respect to such matters.

(v) **Compliance with Law.** Access Entity is in material compliance with all laws and regulations applicable to Access Entity's activities in connection with this CMA.

(vi) **No Conflicting Rights.** Access Entity has granted no exclusive or equivalent rights to any other provider of Communication Services within Vistancia that are comparable to Cox's preferred provider status with respect to the Communication Services hereunder, prior to the Agreement Date.

10. Default and Remedies.

(a) **Events of Default.** Except in case of Unavoidable Delay (in which event the time for performance hereunder shall be extended by the period of time that such Unavoidable Delay exists), each of the following circumstances shall constitute a default under this CMA, in which case the non-defaulting party shall have the remedies provided below and in Section 11 with respect to the type of default that has occurred:

(i) **Monetary Default.** A party shall be in "Monetary Default" upon failure to pay any sum of money due hereunder within 30 days after receipt of written notice that payment is delinquent.

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(n) **Performance Default.** A party shall be in "Performance Default" if the party fails to perform any obligation hereunder (other than an obligation which the failure to perform results in a Monetary Default) when performance is due and commence the cure thereof within 30 days of receipt of notice of the failure and diligently prosecute such cure to completion.

(b) **Remedies for Monetary Default.** In the event of a Monetary Default, the non-defaulting party shall have the right to recover the amount determined to be due in accordance with the applicable dispute resolution procedure of Section 12, together with interest thereon from the date such amount was due until paid at the rate of 12% per annum.

(c) **Remedies for Performance Default.** In the event of a Performance Default, the non-defaulting party shall have the right to cure on behalf of the defaulting party any default hereunder, and to obtain reimbursement from the defaulting party for the cost of such cure, together with interest thereon from the date such cost was paid until reimbursed at the rate of 12% per annum, in accordance with the applicable dispute resolution procedure of Section 12. The non-defaulting party shall have the right to offset against the amount due any amount then due, or thereafter becoming due, to the defaulting party from the non-defaulting party after such amount has been determined in accordance with the applicable dispute resolution procedure of Section 12.

(d) **Cox Additional Remedies.** In the event of a Performance Default by Master Developer or Access Entity, Cox shall have the right to collect actual damages, obtain specific performance or injunctive relief in accordance with the applicable dispute resolution procedure of Section 12.

(e) **Master Developer and Access Entity Additional Remedies.** In the event of a Performance Default by Cox, Master Developer (or Access Entity, as applicable) shall have the right to collect actual damages, obtain specific performance or injunctive relief in accordance with the applicable dispute resolution procedure of Section 12.

(f) **Termination.** The non-defaulting party shall have the right to terminate, cancel or rescind this CMA as provided for in the applicable subsections of Section 12.

(g) **Monetary Damages.** The non-defaulting shall have no right to obtain monetary damages except as expressly provided in this Section 10.

(h) **No Consequential Damages.** The defaulting party shall have no liability for incidental, indirect, consequential or punitive damages.

(i) **CSER and License.** No breach or default under this CMA by either party shall have any effect upon, nor shall any such breach or default impair or lessen, directly or indirectly, the rights or obligations created by the CSER and the Non-Exclusive License (except in the event of termination of this CMA due to such default, in which event the rights and obligations of the parties shall be as provided in Section 11 below); the parties hereto representing and acknowledging that the CSER and Non-Exclusive License are independent of this CMA (subject to the provisions of Section 11 below).

11. **Termination and Partial Termination; Rights of Parties after Termination.**

(a) **Additional Rights to Terminate.** In addition to termination on expiration of the Initial Term as provided in Section 2 or termination as permitted under Section 10, this CMA may be terminated or partially terminated under the following circumstances:

(i) **Cessation or Interruption of Communication Service.** In the event Cox is unable or otherwise fails to provide Cable Television or Internet Access Service to Vistancia or any portion thereof, due to loss of its license from City of Peoria or otherwise, or in the event Cox is unable or otherwise fails to provide Telephone Service directly or through a third party to

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Violation of any portion thereof, or in the event that Cox discontinues providing any such Communication Service for any reason whatsoever, Master Developer shall have the right to terminate this CMA effective as of the time that Cox ceased to provide the affected Communication Service.

- (a) **Master Developer Determination.** If Master Developer determines that Cox has failed to provide the Communication Services, or any component thereof (e.g., Internet Access Services, Cable Television Service, Telephone Services) in a timely, satisfactory and/or otherwise consistent with the spirit and intent of this CMA, Master Developer shall give Cox a written explanation of such determination and the reasons therefor. Cox must respond to Master Developer, in writing, within 10 business days of receipt of such determination and explanation, including an explanation of its response and/or, if applicable, its proposed plan of resolution. Thereafter, within ten (10) business days of Master Developer's receipt of Cox's response, the parties shall meet, in person or telephonically, in order to discuss their differences. Within 10 business days following such meeting (or if Cox is unable or otherwise fails to meet with Master Developer within such 10-business-day period, within 20 business days of Master Developer's receipt of Cox's response, or if Cox failed to timely respond to Master Developer's initial communication, within 30 business days of Cox's receipt of Master Developer's initial determination), Master Developer shall communicate to Cox, in writing, any remaining unresolved issues. Thereafter: (1) Cox may elect to initiate the mediation process provided for in Section 12(a), by notice to Master Developer within 5 business days of receipt of Master Developer's list of unresolved issues, following which mediation process Master Developer may either terminate this CMA or, if Master Developer does not terminate this CMA, this CMA shall remain in full force and effect; or (2) if Cox fails to timely initiate the mediation process provided for in Section 12(a), and thereafter fails to resolve such issues to Master Developer's reasonable satisfaction within 30 days of receipt of Master Developer's list of unresolved issues, Master Developer shall be entitled to terminate this CMA by notice of termination to Cox.

- (b) **Continuing Rights & Obligations.** After a termination or partial termination, the continuing rights and obligations of Cox and Master Developer shall be as follows:

- (i) **Termination Upon Default or Other Termination or Expiration.** From and after the expiration or earlier termination of this CMA (including, but not limited to, any termination due to uncured default): (A) the Non-Exclusive License shall remain in effect with respect to, and Cox shall continue to have the rights of access to, each SFR and MFU provided by all Platted Easement Areas contained on Plats that have been recorded as of the date of such expiration or termination, and (B) Cox may continue to deliver Communication Service to the SFRs and MFUs located within such Plats, and install, operate and maintain its Technology Facilities within such Platted Easement Areas, all in accordance with the terms of the Non-Exclusive License. No termination or expiration of this CMA shall terminate or restrict in any way the rights that Cox has or may have under the Non-Exclusive License or by applicable law or regulation to offer and provide Communication Services to residents of SFRs and MFUs located within Plats that have been recorded as of the date of such termination or expiration; but, the Non-Exclusive License shall terminate with respect to, and unless otherwise required by applicable law or regulation, Cox shall have no further right to offer and provide Communication Services or install Technology Facilities within any portion of the Development that has not been subjected to or included within a recorded Plat as of the date of such expiration or termination. After termination or expiration, Master Developer and/or the Access Entity shall have the right to enter into a preferred provider or other similar agreement with another communication services provider, including granting of one or more non-exclusive license agreement(s) on terms that are the same as or different from the Non-Exclusive License; provided that Cox may continue to serve those existing residents within the areas described above in this subsection that desire to continue subscribing to Cox's Communications Services.

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(u) **No Obstruction.** *Regardless of the reason for termination, Master Developer shall not obstruct, interfere with or discriminate against any efforts by Cox to enter into an arrangement with Peoria or other applicable governmental authority for installation, use, maintenance and operation of Technology Facilities in Peoria or other applicable governmental right of way, and/or with a Neighborhood Builder for the provision of Technology Facilities or Communication Services in an area outside of Vistancia. Cox acknowledges and agrees, however, that any exercise by the Access Entity of its rights under the CSER shall not constitute a violation of the foregoing provision.*

(c) **Unwinding.** Upon the expiration or earlier termination of this CMA, the parties shall take such actions (and otherwise assist each other) in such reasonable and prudent time and manner as is appropriate in order to "unwind" the co-marketing and other relationships established under this CMA, including, without limitation:

(i) **Removal of Property.** Within 30 days after the expiration or earlier termination of this CMA, (1) Cox shall remove any and all of their other facilities, equipment, furnishings and other items of personal property which are located within improvements or structures, or otherwise on property, owned by Master Developer, Vistancia Maintenance Corporation, any Home Owners Association, or any Neighborhood Builder; and (2) Master Developer shall remove any and all of its facilities, equipment, furnishings and other items of personal property which are located within or on property owned by Cox;

(ii) **Destruction of Co-Branded Materials.** Each party shall eliminate, destroy and cease the use of any co-branded or joint marketing materials produced under or in accordance with this CMA; and

(iii) **Intranet Disconnection.** Cox shall disconnect from the Cox Technology Facilities any electronic connections and/or electronic interfaces with respect to "Vistancia.net" and Master Developer shall remove all of its equipment used in the operation of "Vistancia.net" from the property owned by Cox.

12. **Dispute Resolution Mechanisms.**

The parties have agreed on the following mechanisms in order to obtain prompt and expeditious resolution of disputes hereunder. In the event of any dispute, controversy or claim of any kind or nature arising under or in connection with the Agreement and the parties are unable to resolve through informal discussions or negotiations, the parties agree to submit such dispute, controversy or claim to mediation or arbitration in accordance with the following procedures:

(a) **Mediation.** In the event that there is an unresolved dispute not provided for in any other Section of this CMA, either party may make written demand for mediation to the other party and to a mediator mutually acceptable to the parties (the "Mediator"). Within five (5) business days after receipt of such demand, the responding party may forward to the Mediator and the initiating party a written response setting forth any other issues and concerns which they believe are relevant to the issues presented for mediation. Unless otherwise agreed, once a demand for mediation has been filed, there shall be no ex parte communications with the Mediator.

(b) **Information.** A Mediator shall promptly determine if all parties are in possession of adequate information necessary to evaluate the issues and concerns set forth in the demand notice and/or the response thereto (collectively the "Claims"). In the event he deems that they are not, he shall utilize his best efforts to obtain the information in a prompt manner. The Mediator shall immediately prepare and deliver an agenda to both parties within fifteen (15) days after the demand for mediation was received. The Mediator shall then schedule a conference among the parties, to occur within thirty (30) days after the demand for mediation was received. The conference will be attended by the persons most familiar with the issues set forth in the Claims, and by a representative of each party, who is authorized to act on

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behalf of such party as to reaching an agreement on the Claims. The Mediator shall lead negotiations between the parties upon preparation of a written summary by the Mediator. The proceedings and all documents prepared exclusively for use in these proceedings shall be deemed to be matters pertaining to settlement negotiations, and not subsequently admissible at any further proceeding, except for the summaries of agreements prepared by the Mediator and acknowledged by the parties. The cost of the Mediator shall be borne equally by both parties. Upon a determination by the Mediator that further negotiations are unlikely to achieve further meaningful results, he shall declare the mediation procedure terminated, and any matter not resolved may be referred to arbitration as provided below.

- (c) **Arbitration.** Either party may demand arbitration by giving the other party written notice to such effect, which notice shall (i) describe, in reasonable detail, the nature of the dispute, controversy or claim and (ii) name an arbitrator who is experienced in the subject matter of the issue and dispute. Within ten (10) days after the other party's receipt of such demand, such other party shall name the second arbitrator who is experienced in the subject matter of the issue in dispute. The two arbitrators so named shall select a third arbitrator who is also experienced in the subject matter of the issue in dispute.
- (d) **Costs & Fees.** Master Developer and Cox shall each bear fifty percent (50%) of all fees, costs and expenses of the arbitration, and each party shall bear its own legal fees and expenses, and costs of all experts and witnesses; provided, however, that if the claim by the party is upheld by the arbitration panel and in all material respects, then the arbitration panel may apportion between the parties as the arbitration panel may deem equitable the costs incurred by the prevailing party.
- (e) **Procedures.** The party demanding arbitration shall request the arbitration panel to (i) allow for the parties to request reasonable discovery pursuant to the rules that are in effect under the State of Arizona Superior Court Rules of Civil Procedure for a period not to exceed sixty (60) days prior to such arbitration and (ii) require the testimony to be transcribed.
- (f) **Award Final.** Any award rendered by the arbitration panel shall be final, conclusive and binding upon the parties and any judgment thereon may be entered and enforced in any court of competent jurisdiction.

13. **Assignment.**

- (a) **No Assignment.** Neither Cox nor Master Developer may assign this CMA or its rights under this CMA or delegate its responsibilities for performance under this CMA, and no transfer of this CMA by operation of law or otherwise shall be effective, without the prior written consent of the other party (which shall not be unreasonably withheld, conditioned or delayed if it occurs prior to the expiration, termination or partial termination of this CMA and which may be withheld in the sole and absolute discretion of the party whose consent is required if it occurs following the expiration, termination or partial termination of this CMA), except as provided in subsections (b) or (c).
- (b) **Master Developer.** Master Developer shall have the right to assign its right, title and interest (and to be concurrently relieved of related liabilities assumed in writing), without Cox's consent (i) to any other developer in connection with an assignment of substantially all of the then existing interest of Master Developer in Vistaair; (ii) to any entity which has, directly or indirectly, a 30% or greater interest in Master Developer (a "Master Developer Parent") or in which Master Developer or a Master Developer Parent has a 30% or greater interest (a "Master Developer Affiliate"); (iii) to any entity with which Master Developer and/or any Master Developer Affiliate may merge or consolidate; (iv) to a buyer (whether by sale or exchange) of substantially all of the outstanding ownership units of Master Developer; or (v) to the Access Entity or to any other entity that controls the utility easements or other rights in the areas where the Communication Services are located. Any such assignment by Master Developer shall not be effective until the assignee signs and delivers to Cox a document in which the assignee assumes responsibility for all of Master Developer's obligations under this CMA arising from

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and after the effective date of assignment and if such assignee has entered into a written agreement, in form reasonably acceptable to Cox, assuming, without condition, reservation or exception, the obligations of Master Developer under this CMA that are to be performed after the effective date of the assignment, then Master Developer shall be relieved of all responsibility for performance of its obligations under this CMA which arise after the effective date of the assignment.

- (c) Cox. Cox may assign Cox's interest in this CMA and in any easement, permit or other assurances of access granted to Cox hereunder or pursuant hereto respecting its Technology Facilities without Master Developer's consent (i) to any entity which has, directly or indirectly, a 34% or greater interest in Cox (a "Parent") or in which Cox or a Parent has a 30% or greater interest (an "Affiliate"); (ii) to any entity with which Cox and/or any Affiliate may merge or consolidate; (iii) to a buyer (whether by sale or exchange) of substantially all of the outstanding ownership units of Cox or any Affiliate; (iv) to a buyer (whether by sale or exchange) of substantially all the assets of Cox used in the operation of Cox's business conducted in Peoria or other applicable governmental authority, or to any transferee of Cox's license (or other legal authority of Cox) to provide Cable Television Services to customers in Peoria, upon the franchising authority's approval of any such transfer. Any such assignment shall not be effective until the assignee signs and delivers to Master Developer a document in which the assignee assumes responsibility for all of Cox's obligations under this CMA arising from and after the effective date of assignment and if such assignee has entered into a written agreement, in form reasonably acceptable to Master Developer, assuming, without condition, reservation or exception, the obligations of Cox under this CMA that are to be performed after the effective date of the assignment, then Cox shall be relieved of all responsibility for performance of its obligations under this CMA which arise after the effective date of the assignment.

14. Miscellaneous.

- (a) Amendments. No amendment of this CMA shall be effective unless made in writing executed by both Master Developer and Cox (and by Access Entity, to the extent any such amendment affects or relates to the obligations or agreements of Access Entity hereunder).
- (b) Integration. The parties agree that this CMA, including all exhibits hereto, and the grant of easements or other assurances of access pursuant hereto (including, but not limited to, the Non-Exclusive License), constitute the entire agreement and understanding between Master Developer, the Access Entity and Cox with respect to the subject matter covered thereby and supersede all prior agreements except those referred to herein, representations and understandings, written or oral, between Master Developer, the Access Entity and Cox with respect to such subject matter.
- (c) Attorneys' Fees. In the event of any dispute or legal proceeding (including judicial reference and arbitration) between the parties arising out of or relating to this CMA or its breach, the prevailing party shall be entitled to recover from the non-prevailing party all fees, costs and expenses, including but not limited to attorneys' and expert witness fees and disbursements (and specifically including fairly allocated costs of in-house counsel), incurred in connection with such dispute or legal proceeding, any counterclaim or cross-complaint, any action to confirm, correct or vacate an arbitration award, any appeals and any proceeding to establish and recover such costs and expenses, in such amount as the court, referee or arbitrator determines reasonable. Any party entering a voluntary dismissal of any legal proceeding, without the consent of the opposing party in such proceeding shall be deemed the nonprevailing party.
- (d) Unenforceability. The determination that any provision of this CMA is invalid or unenforceable will not affect the validity or enforceability of the remaining provisions or of that provision under other circumstances. Any invalid or unenforceable provision will be enforced to the maximum extent permitted by law.

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(c) **Governing Law.** This CMA shall be governed by and construed in accordance with the laws of the State of Arizona.

(f) **Notices.** Any notice or demand from one party to the other under this CMA shall be given personally, by certified or registered mail, postage prepaid, return receipt requested, by confirmed fax, or by reliable overnight courier to the address of the other party set forth on the signature page of this CMA. Any notice served personally shall be deemed delivered upon receipt, served by facsimile transmission shall be deemed delivered on the date of receipt as shown on the received facsimile, and served by certified or registered mail or by reliable overnight courier shall be deemed delivered on the date of receipt as shown on the addressee's registry or certification of receipt or on the date receipt is refused as shown on the records or manifest of the U.S. Postal Service or such courier. A party may from time to time designate any other address for this purpose by written notice to the other party.

(g) **Relationship of Parties.** The relationship of Master Developer and Cox (and of the Access Entity and Cox) shall be one of independent contractor, not as agent, partner, joint venturer or employee.

(h) **Third Party Beneficiaries.** Nothing contained in this CMA is intended or shall be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this CMA.

(i) **Waiver.** No waiver by any party of any right or remedy under this CMA shall be deemed to be a waiver of any other or subsequent right or remedy under this CMA. The consent by one party to any act by the other party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

(j) **Writing Required.** No act, delay or omission done, suffered or permitted by one party to this CMA shall be deemed to waive, exhaust or impair any right, remedy or power of such party hereunder, or to relieve the other party from full performance of its obligations under this CMA. No waiver of any term, covenant or condition of this CMA shall be valid unless in writing and signed by the obligee party. No custom or practice between the parties in the administration of the terms of this CMA shall be construed to waive or lessen the right of a party to insist upon performance by the other party in strict compliance with the terms of this CMA.

(k) **Brokerage.** Each party to this CMA represents and warrants that it has not dealt with any real estate broker or agent or any finder in connection with this CMA. Each party agrees to indemnify, protect, defend with counsel acceptable to the other party and hold harmless the other party against any claim for commission, finder's fee or like compensation asserted by any real estate broker, agent, finder or other person claiming to have dealt with the indemnifying party in connection with this CMA.

(l) **Additional Documents.** Each party hereto shall execute and deliver on such additional instruments as may from time to time be necessary, reasonable and/or appropriate and requested by another party in order to implement and carry out the obligations agreed to hereunder.

(m) **Continuing Effect.** All covenants, agreements, representations and warranties made in or pursuant to this CMA shall be deemed continuing and made at and as of the Agreement Date and at and as of all other applicable times during the Term.

(n) **Meaning of Certain Terms.** When the context so requires in this CMA, words of one gender include one or more other genders, singular words include the plural, and plural words include the singular. Use of the word "include" or "including" is intended as an introduction to illustrative matters and not as a limitation. References in this CMA to "Sections" or "Subsections" are to the numbered and lettered subdivisions of this CMA, unless another document is specifically referenced. The word "party" when used in this CMA means Master Developer, the Access Entity or Cox unless another meaning is

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required by the context. The word "person" includes individuals, entities and governmental authorities. The words "government" and "governmental authority" are intended to be construed broadly and include governmental and quasi-governmental agencies, instrumentalities, bodies, boards, departments and officers and individuals acting in any official capacity. The word "laws" is intended to be construed broadly and includes all statutes, regulations, rulings and other official pronouncements of any governmental authority and all decrees, rulings, judgments, opinions, holdings and orders of a court, administrative body or arbitrator.

- (e) **Rules of Construction.** The language in all parts of this CMA shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against either party. The parties hereto acknowledge and agree that this CMA has been prepared jointly by the parties and has been the subject of arm's length and careful negotiation, that each party has been given the opportunity to independently review this CMA with legal counsel, and that each party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of this CMA, this CMA shall not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction shall be utilized.
- (f) **Counterparts.** This CMA may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
- (g) **Proprietary Information.** Each party acknowledges and agrees that any and all information emanating from the other's business in any form is "Confidential Information", and each party agrees that it will not, during or after this CMA terminates, permit the duplication, use, or disclosure of any such Confidential Information to any person not authorized by the disclosing party, unless such duplication, use or disclosure is specifically authorized by the other party in writing prior to any disclosure, provided that neither party shall have any obligation with respect to any such information that is, or becomes, publicly known through no wrongful act of such party, or that is rightfully received from a third party without a similar restriction and without breach of this CMA. Each party shall use reasonable diligence, and in no event less than that degree of care that such party uses in respect to its own confidential information of like nature, to prevent the unauthorized disclosure or reproduction of such information. Without limiting the generality of the foregoing, to the extent that this CMA permits the copying of Confidential Information, all such copies shall bear the same confidentiality notices, legends, and intellectual property rights designations that appear in the original versions. For the purposes of this Section, the term "Confidential Information" shall not include: information that is in the public domain; information known to the recipient party as of the date of this CMA as shown by the recipient's written records; unless the recipient party agreed to keep such information in confidence at the time of its receipt; and information properly obtained hereafter from a source that is not under an obligation of confidentiality with respect to such information.
- (i) **Recordings.** Master Developer agrees to execute and record documents, which will establish Cox's easement rights on plats and maps of dedication, by labeling such easements as "D.U.A.S.S.E" areas in accordance with the terms and conditions of the CSER and Non-Exclusive License, as such documents are prepared by the Master Developer.

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IN WITNESS WHEREOF, the parties hereto, intending to be legally bound hereby, have executed this Co-Marketing Agreement as of the date first written above.

"Master Developer"

Address: 6720 N. Scottsdale Road
Suite 160
Scottsdale, AZ 85253
Phone: (480) 985-8770
Facsimile: (480) 985-1419

and required copy to
8800 N. Gainey Center Drive
Suite 370
Scottsdale, AZ 85258
Phone: (480) 367-7600
Facsimile: (480) 367-2341

SHEA SUNBELT PLEASANT POINT, LLC, a
Delaware limited liability company

By: Shea Homes Southwest, Inc., an Arizona
corporation, its Member

By: *Jeff McDuen*
ASCT REC

By: Sunbelt Pleasant Point Investors, L.L.C., an
Arizona limited liability company, its Member

By: Sunbelt PF, L.L.P., an Arizona limited
liability limited partnership, its Manager

By: Sunbelt Holdings Management, Inc.,
an Arizona corporation, its General
Partner

By: *Curtis E. Smith*
Curtis E. Smith, its Chief
Operating Officer

"Cox"

Address: 20401 N. 29th Avenue
Phoenix, AZ 85719

COXCOM, INC., a Delaware corporation,
d/b/a COX COMMUNICATIONS Phoenix

By: *Howard Tegen*
VP of Business Operations

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"Access Entity"

Address: 6720 N. Scottsdale Road
Suite 160
Scottsdale, AZ 85253
Phone: (480) 905-0770
Facsimile: (480) 905-1419

and required copy to
8100 N. Gainey Center Drive
Suite 370
Scottsdale, AZ 85258
Phone: (480) 367-7600
Facsimile: (480) 367-2241

VISTANCIA COMMUNICATIONS, L.L.C., an
Arizona limited liability company

By: Shea Sunbelt Pleasant Point, LLC, a Delaware
limited liability company, its Manager

By: Shea Homes Southwest, Inc., an Arizona
corporation, its Member

By: *Shea Homes*
Asst Sec

By: Sunbelt Pleasant Point Investors, L.L.C., an
Arizona limited liability company, its
Member

By: Sunbelt PP, L.L.P., an Arizona limited
liability limited partnership, its
Manager

By: Sunbelt Holdings Management,
Inc., an Arizona corporation, its
General Partner

By: *Curtis E. Smith*
Curtis E. Smith, its Chief
Operating Officer

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EXHIBIT A

Contract Provision - Purchase and Sale Agreements with Neighborhood Builders

Seller has entered into that certain Co-Marketing Agreement dated April 8th 2003 with Coxcom, Inc., a Delaware corporation d/b/a Cox Communications Phoenix ("Cox") on behalf of itself and its affiliated entities, a true and correct copy of which, together with all amendment(s) thereto (if any) that have been executed as of the date of this Agreement (such Co-Marketing Agreement and amendment(s) being hereinafter referred to as the "CMA") has been provided by Seller to Buyer. Buyer acknowledges and agrees that it is a "Neighborhood Builder" as defined in the CMA. Buyer hereby agrees that during the term of the CMA:

(a) Buyer shall provide substantially the same cooperation and coordination with Cox as agreed to by Master Developer pursuant to Section 6(a) of the CMA;

(b) Buyer shall observe the Pre-Wire Specifications set forth in Exhibit D of the CMA and shall install the material referenced therein, in accordance therewith, in each residence constructed by Buyer on the Property, all at the sole cost and expense of Buyer;

(c) Cox shall have the exclusive right to market and promote Communication Services (as defined in the CMA) within any model home operated by Buyer within the Property;

(d) Buyer and Seller shall advertise Vistancia in all its media and print materials as a "Cox Digital Community" by including the Cox Digital Community logo (to be provided by Cox).

(e) Cox shall have the preferred right to provide Communication Services to each model home office operated by Buyer within the Property;

(f) Buyer shall provide, and pay the cost of providing (i) access by Cox to all necessary utility distribution trenches within the Property, which trenches shall comply with the route and specifications provided by the APS plans therefor, and (ii) the building sleeves from utility distribution trenches to each residence constructed by Buyer on the Property.

(g) Cox is intended to be a third-party beneficiary of all of the foregoing provisions of this Section and, as such, shall have the right to enforce this Section.

[As used in the foregoing provision, the term "Seller" would refer to Master Developer and the term "Buyer" would refer to the Neighborhood Builder, and the term "Property" would refer to the real property within Vistancia being purchased by the Neighborhood Builder pursuant to the particular purchase agreement or option agreement.]

EXHIBIT B

Technology Facilities

Technology Facilities shall be designed and installed to meet the following minimum requirements:

- 1) Network:
 - a) Distribution plant will be designed, installed and activated to 750 MHz bi-directional HFC Network supported via self-healing fiber ring backbone.
 - b) Average node size will be 500 homes and be limited to no more than six (6) actives in cascade.
 - c) Developer to provide all on-site trenches for placement of infrastructure. Cox will install all conduit capacity needed exclusively for the Cox network to enable deployment of Cox Communication Services. Advance participation in actual and pre-joint trench coordination efforts with Vistancia and other expected utilities is essential to limit post-Joint Trench trenching and disruption. Cox will install shadow conduit where appropriate based on anticipated Cox needs.
 - d) The provisioning from the pedestal, to the SFR of MFU Demarcation NID (Network Interface Device), shall be by coaxial cable. Developer will use reasonable efforts to enable Cox's standard design parameters that specify a maximum distance of 150 feet between pedestal and NID. Developer will use reasonable efforts to enable Cox's access to every NID. NID's will be network powered.
 - e) Equipment shall be enclosed in CATV type pedestals cabinets and vaults.
- 2) Cable Television Services: Meet or exceed industry standards for programming quantity, and signal quality, of analog and digital cable programming.
- 3) Telephone Services: Voice services shall be offered in compliance with the ACC Standards of Service, and the CLEC Tariff, with the State of Arizona.
- 4) Internet Access Services: Cox will exercise reasonable care to protect the integrity and security of all network traffic and shall actively monitor for incursions. Data modems shall be compliant with all MCNS/DOCSIS standards and provide for data packet encryption.
- 5) Bandwidth: The network will be capable of delivery in accordance with the Technological & Services Standards established under the FCC and established franchise commitments.
- 6) Service Bandwidth Guarantee: In the event that the above standards are determined not to have been met, or have subsequently degraded below the minimums for an average of over 10% of the customer base, within a node, over one month's time, Cox shall, at its sole cost, do one or more of the following:
 - Split the affected node(s) to lessen the number of homes served but without obligation to split below an average of 50 units per node.
 - Open additional data channels, or
 - Implement such other actions, as Cox deems appropriate, to meet the minimum service standards.

EXHIBIT C

Cox Digital Community Marketing & Promotion Program

This Exhibit describes the marketing and promotion program (i.e. the Cox Digital Community Marketing & Promotion Program described herein) that shall be undertaken by Cox with respect to the Communication Services in Vistancia, if and to the extent that Master Developer (in its sole discretion) requests such services and support from Cox. Developer shall not be entitled to request any marketing or promotion services from Cox in excess of those set forth in this Exhibit.

Master Developer will assist Cox in meeting and communicating with Neighborhood Builders to educate them and their sales and leasing agents about, and encourage them to actively participate in the Cox Digital Community Marketing & Promotion Program.

All marketing support provided by Cox under the Cox Digital Community Marketing & Promotion Program will be mutually agreed upon by both parties and will be through the advertising agency chosen by Cox. Cox will provide a marketing campaign that will include the following:

Marketing Support will be in combination of several advertising/marketing mediums beneficial to Cox and Master Developer, which will include, but not be limited to the following:

- 1) Support the cost to develop and print customized literature highlighting the Vistancia Community and partnership with Cox. All material will be subject to prior review and reasonable approval of each party co-branded with Cox and Master Developer trade names and trademarks.
- 2) A minimum of one month advertising in a local homebuilder/developer publication which will include the Cox digital logo and mutually agreed upon content by both Cox and Master Developer.
- 3) Assist in establishing a partnership with Cable Rep, an affiliate of Cox Communication, and Master Developer and to use reasonable efforts to obtain Cable Rep's approval to receive discount cross channel promotional advertising highlighting Vistancia Community. All advertising will be subject to prior review and reasonable approval of each party co-branded with Cox and Master developer trade names in the trademarks.
- 4) Participation in any future "Cox Digital Community" media campaigns that occur. Master Developer will be given first right of refusal to participate in campaign(s) before being offered to any other Master Developer/Community. Any specific builder media campaign developed by Cox will be exempt, unless builder is an active participant in Vistancia Community, wherein Cox will take every opportunity to promote the Master Developer/Builder/Cox Partnership, highlighting Vistancia.
- 5) Support of any Grand Opening activities highlighting the Vistancia Community. Cox's participation would include, but not be limited to, product information booths with active product demonstrations, manpower assistance, banners with logos highlighting the partnership and advertising assistance.
 - (a) provide literature to the sales office highlighting Cox services
 - (b) all of the above will require regular meetings and will include Master Developer and Cox to confer at mutually convenient times to formulate, evaluate and modify marketing plans and to prepare, review and modify promotional brochures, packages, advertisements and other collateral materials;
 - (c) cooperate to create and use co-branded promotional and sales brochures, packages and other collateral materials for Vistancia that will reference Vistancia partnership with Cox Communications and will include the "Cox Digital Community", the form and content of which will be subject to the prior reasonable approval of each party.

EXHIBIT C

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- (d) introduce and coordinate the respective marketing programs, sales and marketing agents;
- (e) highlight the Communication Services in meetings with prospective buyers and at other opportune times during the marketing process;
- (f) provide prospective buyers with the most current information and promotional brochures and materials;
- (g) offer training to Master Developer's agents to include training by a Cox Sales Coordinator with respect to the marketing of Communication Services and the policies and procedures respecting the same, and Master Developer shall make such agents available for such training on a reasonably acceptable schedule;
- (h) seek to include Cox's subscription agreement for video and data, which shall include the Acceptable Use Policy, and description of all services in each escrow package and/or New Homeowners welcome folders;
- (i) include Cox's name and a brief description of Cox's services, a Cox digital logo, in all applicable written, oral and electronic advertisements of Vistancia or any phase thereof whenever such advertisements describe the technology aspects of the amenities or services;
- (j) when available promote use of the Cox High Speed Internet demo's in the main Model Sales Offices of the Neighborhood Builders;
- (k) allow Cox to use technology displays as a model to advertise, demonstrate, promote and develop the Communication Services and to conduct third party tours (excluding tours for owners, agents and promoters of other master planned communities in Peoria or other applicable governmental authority and excluding other telecommunications services providers), including producing photographs, video tape, film or other media presentations relating to provision of Communication Services to the Property;
- (m) encourage all parties directly associated with the sale or lease of SFRs or MFUs to:
 - (1) utilize the Technology demos as a primary component of their marketing and promotional efforts, including directing and encouraging prospective purchasers to visit it as the central source of information on Communication Services;
 - (2) provide prospective buyers with a copy of information and promotional brochures and materials most recently provided by Cox for Vistancia residents;
 - (3) include signage and brochures of Cox in model units and other Common Area facilities to be jointly determined by Cox and Master Developer and/or Neighborhood Builders;
 - (4) participate in training respecting marketing Communication Services and policies and procedures respecting marketing;
 - (5) include brief descriptions of products and services in advertisements;
 - (6) incorporate into the New Homebuyers Information folders, "only" Cox sales packages information and materials when referring to technology providers for Vistancia, SFRs being developed and Communication Services expected to be a part thereof.
 - (7) provide notice of pending escrow closings

EXHIBIT C
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EXHIBIT D

**Cable Television/Internet Access Services Pre-Wire Specifications
Violencia Residential Pre-Wiring Guidelines**

SFR and MFU INSIDE WIRING

Inside wiring specifications are based on the voice services provided via copper (CAT 5E). Video and high-speed data services are to be provided coax (RG6 Bonded foil, 60% braid, non-bonded tape, flame retardant PVC jacket. Meets NEC Article 820 V Rating, UL Listed).

CABLE TELEVISION/INTERNET ACCESS WIRING

The Cable Television Service wiring must be home run from the Service Center to each outlet desired. Since it is anticipated that demand for advanced services will be high, the corresponding distribution arrangement should be used in conjunction with dual RGA coaxial cable of tri or quad shield construction, with the recommended RG6 connector.

360-degree crimp connectors must be used consistent with the manufacturer's recommendation for the particular cable installed. No staples or hard fasteners shall be used to secure coaxial cables.

The cable run of each outlet line (RG6 and CAT 5E) connecting an individual outlet back to the Service Center must be identified and recorded. A tab must be attached to each line at the Service Center identifying the rooms served. The builder or the electrical contractor must provide a list of this configuration to the local cable company representative at the time of construction. This information is required to comply with new FCC regulations pertaining to ownership of in-home wiring, FCC Part 76 of Title 47 CFR (76.5(11), 76.602).

EXHIBIT E

Technology & Service Standards

1. Standards. Cox shall, or shall cause its affiliated companies to, develop, deliver and generally maintain the Communication Services in accordance with the following applicable industry benchmark practices and standards "Technology & Service Standards")
 - (a) Franchise or license requirements imposed by Peoria or other applicable governmental authority, the Federal Communications Commission ("FCC"), the Arizona Corporation Commission ("ACC") or other applicable governmental entities;
 - (b) Tariffs on file with the ACC
 - (c) Bellcore (including TA-NWT-000909);
 - (d) National Cable Television Association; and
 - (e) Data Network Standards.
2. Security. Cox will exercise reasonable care to protect the integrity and security of all network traffic and shall actively monitor for incursions. Reports on incursions and other security issues will be provided to Master Developer. Data modems shall be compliant with all MCNS/DOCSIS standards and provide for data packet encryption.
3. Service Response. Cox must monitor all network components in accordance with applicable standards described in paragraph 1. Cox shall provide credits for service outages in accordance with its Franchise or License requirements imposed by Peoria or other applicable governmental authority, FCC, ACC, or other applicable governmental entities, and as provided in the agreement with the individual subscribers for the provision of service; and such credits shall be reflected on the following period's billing statement; provided that no such credit shall be available where the outage is due to defects or deficiencies in pre-wiring installed by others or failure of a responsible party other than Cox to properly maintain such pre-wiring or due to customer-owned equipment. In no event shall the service standards or credits or remedies be less than those the subscriber is entitled to under the Franchise. Cox will notify Master Developer of significant planned outages under the same conditions in which Cox is mandated by the Franchise authorities to notify the Franchise authorities or the affected customers of such outages and will advise Master Developer of such planned outages no less than 24 hours in advance of the service outage.

EXHIBIT F

Insurance Requirements

Throughout the Term of this Agreement, each party shall maintain the following insurance coverages:

1. Comprehensive Liability. Commercial general liability insurance insuring against claims for bodily and personal injury, death and property damage caused by such party, its employees, agents or contractors providing in the aggregate a minimum combined single limit liability protection of Two Million Dollars (\$2,000,000) per occurrence.
2. Workers Compensation. Workers' Compensation insurance in the statutory amount as required by the laws of the State of Arizona. Such insurance shall include a waiver of subrogation endorsement in favor of the other party.
3. Automobile Liability. Automobile insurance on all vehicles owned or operated by party which are used in any way to fulfill its obligations under this Agreement. Such insurance shall provide a minimum coverage amount of \$1,000,000 combined single limit for bodily injury and property damage.
4. General Provisions. Such insurance coverage shall be maintained under one or more policies of insurance from a recognized insurance company qualified to do business within the Franchise Area and having a Best's rating of not less than A with a financial size of not less than IX. Each party shall furnish evidence of insurance satisfactory to the other prior to the date of this Agreement and thereafter at least ten (10) days prior to the expiration of any insurance coverage required to be maintained hereunder, that insurance coverage required hereunder is in force during the Term of this Agreement.

EXHIBIT C

Marketing Compensation Schedule

Cox will pay Master Developer the sum of Five Hundred Thousand and No/100 Dollars (\$500,000.00) on or before ten (10) days after the date on which the first SFR or MFU within the Village A portion of the Development is connected to any Communication Service provided by Cox.

Cox will pay Master Developer the sum of Five Hundred Thousand and No/100 Dollars (\$500,000.00) on or before ten (10) days after the date on which the first SFR or MFU within the Trilogy portion of the Development is connected to any Communication Service provided by Cox.

Cox will pay Master Developer a percent of revenue, according to the following scale, for its marketing of Cox's products and services. The revenue will be paid on the incremental sales above 75% penetration. The penetration rate will be calculated by dividing active customers by total homes passed. Penetration will be calculated monthly and paid quarterly 90 days after the close of the quarter. This scale applies to Cable Television Service, Telephone Service (excluding long distance), and Internet Access Service. It is exclusive of fees assessed for pay-per-view movies, long distance, installation fees, equipment fees whether purchased or rented, television guides, taxes, assessments, and license fees.

Penetration	Payout
75%-79%	15%
80%-85%	16%
86%-90%	17%
90%-95%	18%
96%-100%	20%

Marketing Compensation will be paid individually per product achieving 75% penetration. Each product must stand on its own merit in order to qualify for marketing compensation.

EXHIBIT B

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Shea Sunbelt Pleasant Point, LLC
&
COXCOM, INC.
PROPERTY ACCESS AGREEMENT

THIS PROPERTY ACCESS AGREEMENT ("Agreement") is entered into this 8 day of April, 2003 between CoxCom, Inc., a Delaware corporation d/b/a Cox Communications Phoenix, on behalf of itself and its Affiliates (as hereinafter defined in this Agreement) ("Cox"), located at 20401 North 29th Avenue, Phoenix, AZ 85027, Shea Sunbelt Pleasant Point, LLC, a Delaware limited liability company ("Master Developer"), located at 6720 N. Scottsdale Road, Suite 160, Scottsdale, AZ 85253, and Vistancia Communications, L.L.C., an Arizona limited liability company ("Access Entity"). Capitalized terms not otherwise defined in this Agreement shall have the meanings ascribed to them in Appendix A attached to the CSER and incorporated therein by reference, which Appendix A is incorporated into this Agreement by reference.

RECITALS

- A. Whereas Master Developer is the beneficial owner of and is developing Vistancia, an approximately 7,100 acre master planned community which includes certain planned commercial buildings, located in the City of Peoria, Arizona ("Peoria"), in accordance with that certain Development and Annexation Agreement executed by Peoria on October 4, 2001 and thereafter recorded in the Official Records of Maricopa County, Arizona, on October 24, 2001, in Instrument No. 2001-0986718 and the PAD plan and other approvals and entitlements referenced therein and related thereto, as amended from time to time.
- B. Whereas Cox has the legal authority and technical expertise to install the Technology Facilities necessary to provide Communication Services to the Buildings (as hereinafter defined).
- C. Whereas Master Developer anticipates transferring portions of Vistancia to Owners for the development of Buildings.
- D. Whereas the Master Developer intends to subject all or a portion of Vistancia to certain easement and access restrictions to facilitate the provision of enhanced technological capabilities, including, but not limited to, those easement and access restrictions set forth in the Common Services Easements and Restrictions to be recorded in the Office of the Recorder for Maricopa County, State of Arizona (the "CSER"). The form of the CSER and the Non-Exclusive License (as hereinafter defined) shall be subject to review and approval by Cox prior to recordation thereof, which approval shall not be unreasonably withheld by Cox and shall be deemed given unless Cox delivers to Master Developer its specific written objections to the proposed form of CSER (or Non-Exclusive License, as applicable) within ten days after Master Developer's delivery thereof to Cox. Even though this Agreement is being executed by the parties prior to recordation of the CSER, this Agreement shall in all events be subject and subordinate to the CSER and the Access Entity's rights thereunder.
- E. Whereas the Master Developer has formed the Access Entity for the purposes of holding the right to grant access to the easements created for the purpose of providing certain technological capabilities that benefit the Owners, tenants and other occupants of Buildings, including, but not limited to, Communication Services.
- F. Whereas pursuant to that certain Non-Exclusive License Agreement to be executed by the Access Entity and Cox and recorded in the Office of the Recorder for Maricopa County, State of Arizona in connection with this Agreement (the "Non-Exclusive License"), Cox will be granted a non-exclusive license by the Access Entity to install Technology Facilities to provide Communication Services to Buildings.

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Cox Initial _____ / Developer Initial Cox

COX-00000067

G. Whereas the Access Entity agrees to grant Cox the Non-Exclusive License.

NOW, THEREFORE, in consideration of the mutual covenants contained in this AGREEMENT, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Master Developer, the Access Entity and Cox agree as follows:

AGREEMENT

1. Definitions.

The following terms shall have the following meanings for all purposes under this Agreement:

- (a) "Access Entity" means Vistancia Communications, L.L.C., an Arizona limited liability company, its successors and assigns.
- (b) "Agreement Date" means the date first set forth in this Agreement.
- (c) "Backbone Conduit" means telecommunications conduit, and pull boxes and vaults serving such conduit, owned by Cox, and which is located along the boundary of public streets within right-of-way and along the boundary of public streets within the Vistancia property. The term "Backbone Conduit" does not include Building Conduit.
- (d) "Building Conduit" means telecommunications conduit which is owned and installed by Owners, and located on the property of a Building to which Cox is providing Communication Services, and which connects a Building with the Backbone Conduit or with other telecommunications facilities located within the right-of-way abutting a Building property upon which the Building Conduit is located. The term "Building Conduit" does not include Backbone Conduit.
- (e) "Building" means a building or other structure within Vistancia that is used for commercial (including, but not limited to, office and retail), office, employment center, and/or industrial purposes in accordance with applicable zoning and recorded deed restrictions. The term "Building" does not include any apartment building, multifamily residential building, or other building or structure occupied as a residence. If a building or other structure within Vistancia is used for both a commercial, office, employment center, and/or industrial purpose that would qualify it as a "Building" pursuant to the foregoing definition, and for another purpose that would not qualify it as a "Building" pursuant to the foregoing definition, then such building or other structure shall be deemed a "Building" hereunder only with respect to that portion thereof that is used for such commercial, office, employment center, and/or industrial purpose(s).
- (f) "Contractors" means contractors, subcontractors, material providers and suppliers.
- (g) "CSER" means the Common Services Easements and Restrictions to be recorded in the Office of the Recorder for Maricopa County, State of Arizona (the form of which shall be subject to review and approval by Cox as provided in Recital D of this Agreement), as amended from time to time.
- (h) "Customer Premises Equipment" means Cox-owned, leased or for sale equipment installed within the commercial customer's space to facilitate any of the Communication Services subscribed to, including but not limited to, converter boxes, cable modems, digital audio receivers, remote control devices and signal amplifiers.
- (i) "Exclusive Marketing Rights" means the rights granted to Cox under Section 5 of this Agreement.



- (j) "Internet Access Services" means the high speed Internet access service Cox provides, currently marketed as "Cox High Speed Internet".
- (k) "Local Exchange Carrier" means the local telephone company, which can be either a Bell operating company, e.g. Qwest, or an independent, which provides local telephone transmission service.
- (l) "Master Declaration" means that certain Declaration of Covenants, Conditions and Restrictions for Vistancia to be recorded in the office of the Maricopa County Recorder, as amended from time to time, which will, among other things, provide for the organization of Vistancia Maintenance Corporation.
- (m) "Master Developer" means Shea Sunbelt Pleasant Point, LLC, a Delaware limited liability company, its successors and assigns.
- (n) "Monthly Recurring Revenue" or "MRR" shall mean all revenues received by Cox (or by its successors and assigns) for the transmission or distribution of the Communication Services through the Cox Technology Facilities located within Vistancia to the Buildings only, including, without limitation, revenue for internet connectivity, but excluding, or deducting from such revenues if the same were included therein, installation and construction fees, taxes, promotional or bundling discounts, equipment, revenue from residential dwellings (such as apartments, condos, and single family homes), revenue from governmental entities, interest charges, bad debts, franchise fees or other governmental charges, surcharges, telecom fund charges, 911 fees, or other governmental authorized assessments (however described) and network access charges.
- (o) "Non-Exclusive License" means the Non-Exclusive License Agreement to be executed by the Access Entity and Cox and recorded in the Official Records in connection with this Agreement (the form of which shall be subject to review and approval by Cox as provided in Recital D), pursuant to which Cox will be granted a non-exclusive license by the Access Entity to install Technology Facilities to provide Communication Services to Buildings.
- (p) "Official Records" means the official records of the Recorder for Maricopa County, Arizona, pertaining to real property.
- (q) "Owner" means any person or entity who acquires or otherwise takes legal title from Master Developer of a development parcel or planned lot for the purpose of development and construction of one or more Buildings thereon, and such person or entity's successors and assigns.
- (r) "Plot" has the meaning set forth in Appendix A of the CSER, and further means a map of dedication, parcel map, or subdivision plat recorded by Master Developer for the purpose, among other things, of creating one or more legal development parcels for sale to one or more Owners, which map of dedication, parcel map, or subdivision plat establishes, among other things, major arterial streets and rights of way for dedication to Pecos or other political subdivision with jurisdiction over Vistancia or the applicable portion thereof; provided, however, that any Plot as described herein shall be subject to the CSER and the Non-Exclusive License. A Plot described in the preceding items is sometimes hereafter referred to as a "Parcel Plot."
- (s) "Vistancia" means the approximately 7,100 acre master planned community developed in Pecos, Arizona, described in Recital A.
- (t) "Technology Facilities" means all Facilities, including, but not limited to, on-site and off-site equipment, which is installed for and/or used in the distribution of Communication Services by Cox to Buildings, including but not limited to equipment cabinets, network interface units, conduit, lines, fiber, wires, cable, pipes, sleeves, pads, cross connect panels, fiber/T1 interfaces, cabling interfaces, patch panels and cords, routers/bridges, fiber transceivers, test equipment,

power interfaces, service drop wiring and service laterals and other structures and improvements, but the meaning of the term does not include Customer Premises Equipment nor does the term include any conduit built by Master Developer or an Owner.

- (u) "Communication Services" shall mean Video Television Services, Internet Access Services and Telephone Service provided to or within Vistancia.
- (v) "Telephone Service" shall mean local and long distance telephone service provided by Cox through one or more affiliates or third parties.
- (w) "Unavoidable Delay" means a delay caused by events, circumstances or acts beyond a party's reasonable control. Such events, circumstances or acts may include, without limitation, and only to the extent beyond the affected party's reasonable control and not resulting from such party's failure or inability to fulfill a monetary obligation, an intervening act of God or public enemy, fire, hurricane, storm, adverse weather conditions, flood, earthquake, epidemic, explosion, volcanic eruption, lightning, nuclear radiation, earth slides, geologic or archaeological condition, contamination of soil or groundwater with hazardous materials, loss of power or utilities, power surges, quarantine restriction, freight embargo, act of war (declared or undeclared), riot, public discord, civil disturbance, act or threat of terrorism, sabotage or criminal damage, regulatory delay, litigation challenging the validity or enforceability of this Agreement, change in law, regulation or policy prohibiting a party from performing its obligations, government expropriation of property or equipment, dissolution or disappearance of utilities, carriers or suppliers of unique materials or equipment or materials or equipment having long delivery periods, a failure to meet delivery schedules by any utility or by any carrier or supplier of unique materials or equipment or by any carrier or supplier of materials or equipment having long delivery periods, interruption or casualty in the transportation of materials or equipment or failure or delay by another party in the performance of an act that must be performed before the action that is delayed.
- (x) "Video Television Services" means the transmission to users of video programming or other programming services provided through any hardware, equipment or other facilities related to such services, together with such user interaction, if any, which is required for the selection or use of the video programming or other programming services.
- (y) "Village Association" means each Village Association as defined in and formed pursuant to the Master Declaration and the applicable Village Declaration therefor.
- (z) "Village Declaration" means each Village Declaration as defined in and recorded pursuant to the Master Declaration, each as amended from time to time.
- (aa) "Vistancia Maintenance Corporation" means the Arizona non-profit corporation to be organized pursuant to the Master Declaration, its successors and assigns.

2. Term.

The initial term of this Agreement (the "Initial Term") shall be for a period of twenty (20) years, commencing on the Agreement Date. At the end of the Initial Term, this Agreement will automatically renew for successive terms of five years each (each such five year term being hereinafter referred to as a "Renewal Term"), unless either party gives written notice of its intent not to renew to the other party at least 90 days prior to expiration of the Initial Term (or the Renewal Term then in effect, as applicable). The Initial Term and any Renewal Term are subject to early termination as provided in Sections 10 and 11 of this Agreement. The Initial Term and any Renewal Term are collectively referred to as the "Term."

3. License and Access Rights.

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Cox Initial / Developer Initial

COX-00000070

- (a) **Development Process.** As used herein, the term "Development Process" means the application and processing by the Master Developer of each Parcel Plat, the recording of Declarations (including, without limitation, the Master Declaration, the Village Declarations, and all similar Declarations and filings contemplated by the Master Declaration and/or any Village Declaration), the filing of Maps of Dedication, and similar processes customarily utilized in the development of subdivisions and commercial properties; it being further understood that "Development Process" shall include, without limitation, the establishment of Platted Easement Areas along all streets and thoroughfares, together with such additional locations as may be reasonable or expedient in carrying out the intent of this Agreement and the Non-Exclusive License.
- (b) **Grant of Non-Exclusive License.** The Access Entity and Cox agree to execute and record the Non-Exclusive License promptly (and in all events within 20 days) following recordation of the CSER (in the form approved by Cox as provided in Recital D). The parties agree that notwithstanding any contrary provision of this Non-Exclusive License, the following terms shall apply to the license and other rights granted to Cox pursuant to the Non-Exclusive License:
- (i) Neither the construction and installation nor the repair, replacement and maintenance of Technology Facilities by Cox shall unreasonably interfere with the development of any Building or with the use or enjoyment thereof by any Owner or subsequent owner thereof.
- (ii) During the Development Process, the Master Developer shall establish and delineate Platted Easement Areas which shall be subject to the rights granted to Cox in the Non-Exclusive License. Notwithstanding any provision to the contrary, the Master Developer will also establish and delineate areas in which easements, licenses or similar rights may be granted either by operation of law, by express grant from the Master Developer and/or the Access Entity or any of their respective designees, or pursuant to the CSER and the Non-Exclusive License; provided, however, that such establishment and delineation shall not erode or lessen the rights conveyed under the CSER or the Non-Exclusive License. Master Developer, the Access Entity and Cox acknowledge and agree that the intent of this Section 3 and the Non-Exclusive License is to provide Cox with physically continuing easements, licenses and access rights throughout Vistancia which allow Cox to reach each Building within Vistancia in accordance with the terms of this Agreement. In the event that the provisions of this Section 3 are not sufficient to accomplish this, Master Developer and the Access Entity shall grant or cause to be granted to Cox such additional, perpetual, non-exclusive easement rights or rights of access as are reasonably necessary to fulfill the intent of this Section 3, including, without limitation, any necessary easements or rights of access between non-contiguous Plats. In the event that Master Developer (and/or the Access Entity, as applicable) is unable or unwilling to provide the additional easements or access rights referenced in the immediately preceding sentence, Cox may, in its sole discretion and in addition to any other rights it may have, (i) seek specific performance of Master Developer's (and/or the Access Entity's, as applicable) obligations hereunder and/or (ii) require Master Developer (and/or the Access Entity, as applicable) to reimburse Cox for the actual cost (plus reasonable expenses) of acquiring such easement rights.
- (iii) Cox shall not unreasonably interfere with the use of the Platted Easement Areas by other providers of services or utilities, except as contemplated by the CSER and the Non-Exclusive License. Specifically, it is understood by Cox that sanitary sewer, storm sewer, natural gas, electricity, and other similar utility services may coexist with Cox in the Platted Easement Areas; and, further, that the Non-Exclusive License is non-exclusive and the Platted Easement Area may be utilized by other, even competitive, Common Service Providers as contemplated by the CSER, this Agreement and the Non-Exclusive License.

- (c) **Repair of Improvements.** Cox shall promptly repair and restore (to their condition existing immediately prior to such use by Cox exclusive of normal wear and tear) any on-site or off-site improvements that are damaged or destroyed in connection with or arising from any use by Cox of the rights granted to Cox pursuant to this Agreement and/or the Non-Exclusive License.

4. **Communication Services & Technology Facilities Obligations of Cox.**

- (a) **Preferred Right to Offer Communication Services.** During the Term of this Agreement, Cox shall have the preferred right to market and offer the Communication Services (including future technology comprising all or part of the Communication Services as it becomes available) to Owners, tenants and other occupants of the Buildings. In addition, Master Developer shall include in its purchase agreements with Owners that Owners shall give Cox a preferred right to market and offer the Communication Services to tenants and other occupants of the Buildings. Master Developer shall cooperate with Cox to the extent enforcement of the Owner's obligations under such provision is required; provided, however, that (i) Master Developer shall not be a required party to any suit or arbitration initiated by Cox seeking to enforce any such Owner obligation, (ii) Master Developer shall not be responsible or liable for any breach or default by an Owner of its obligations under any such provision, and (iii) in no event shall a breach or default by an Owner of its obligations under any such provision constitute a default by Master Developer under this Agreement.
- (b) **Future Effect of Agreement.** Notwithstanding any contrary provision of this Agreement, this Agreement (including, but not limited to, the preferred right granted to Cox under subsection 4(a) and the exclusive rights granted to Cox under Section 5 shall not be binding upon any owner of any portion of Vistancia, other than Master Developer and any Owner that purchases any portion of Vistancia from Master Developer for the purpose of development and construction of one or more Buildings thereon (to the extent provided in subsection 5(b)) and Master Developer. Without limiting the generality of the foregoing, Cox specifically agrees and acknowledges that (i) the preferred right granted to Cox under subsection 4(a) and the exclusive rights granted to Cox under Section 5 may terminate with respect to an individual Building at such time as the Owner that purchased the property from Master Developer on which such Building is located no longer owns, operates or controls such Building or the land on which it is located, and (ii) all preferred rights granted to Cox under subsection 4(a) and all exclusive rights granted to Cox under Section 5 shall terminate at such time as all Owners that purchased property from Master Developer are no longer owning, operating or controlling the respective Buildings in Vistancia.
- (c) **Cox Obligation to Provide Communication Services.** Upon occupancy of the first Building, Cox agrees to make available, at a minimum, the following Communication Services to Owners, tenants and other occupants of the Buildings, which Communication Services shall be provided by Cox in accordance with the standards set forth in Exhibit C.
- (i) **Video Television Services.** Subject to legal and regulatory constraints, Communication Services for each Owner, tenant or other occupant of a Building who subscribes for such service; provided that Cox shall be entitled to cause such service to be provided directly or by or through a parent, subsidiary or Affiliate of Cox.
- (ii) **Service Standard & Upgrades.** Subject to any requirements in the franchise agreement between Cox and the applicable franchise authority, Cox shall upgrade the Communication Services within a reasonable time at no cost to Master Developer, any Owner, or any tenant or other occupant of a Building, to keep Communication Services at a level of service that equals or exceeds the services being offered within the metropolitan statistical area of the community by substantially similar providers of the services included in the term "Communication Services" hereunder. If and when Cox makes other products commercially available, Cox will offer future Communication Services comprising all or a portion of the Communication Services to Buildings and the

Owners, tenants and other occupants thereof, when it is technically, economically and operationally feasible to do so.

- (iii) **Telephone Service.** Subject to legal and regulatory requirements, Cox shall offer Telephone Service to each Owner, tenant and other occupant of a Building who subscribes for such service; provided that Cox shall be entitled to provide such service by or through a parent, subsidiary or Affiliate of Cox, including but not limited to Cox Arizona Telecom, LLC; and provided further that Cox shall have access to such Building and Cox shall meet reasonable customer requirements for individual telephone numbers per Owner, tenant or occupant, but in no event shall Cox be required to exceed the number of telephone numbers per Owner, tenant or occupant than are available from time to time from the Local Exchange Carrier.
- (iv) **Internet Bandwidth Access Services.** Subject to legal and regulatory constraints, Cox shall provide Internet Bandwidth Access Service for each Owner, tenant or other occupant of a Building who subscribes to such service; provided that Cox shall be entitled to cause such service to be provided by or through a parent, subsidiary or Affiliate of Cox.
- (d) **Master Developer or Owner Obligation to Provide Trenches.** Cox shall have no obligation to install the Technology Facilities or deliver the Communication Services to a Building within any phase or portion of Vistancia in which Master Developer or the applicable Owner, tenant or other occupant of such Building has not, at its own expense, constructed such trenches as are needed for Cox to install the Backbone Conduit and associated Technology Facilities.
- (e) **Cox Obligation to Provide Technology Facilities.** Cox agrees to construct, provide, install, repair, replace and maintain all Technology Facilities required in order to provide the Communication Services to the Buildings within Vistancia at the sole cost and expense of Cox, provided that the Technology Facilities will be installed and provisioned over time, on a phase-in basis during the Initial Term of this Agreement, so long as the Communication Services can be provided to each Owner, tenant or other occupant of a Building upon initial occupancy of such Building.
- (f) **Design & Installation Conditions.** Cox shall design and install the Technology Facilities (exclusive of the trenching that is the responsibility of Master Developer or the applicable Owner, tenant or other occupant pursuant to this Agreement) in accordance with the standards set forth in Exhibit B. However, Cox shall have no obligation to install the Technology Facilities or deliver the Communication Services to any Building within any phase or portion of Vistancia in which Master Developer or the applicable Owner, tenant or other occupant has not, at its own expense: (1) completed construction of any Buildings or structures required by Master Developer or the applicable Owner, tenant or other occupant in which any Technology Facilities will be located; (2) performed the excavation, opening and closing (subject to the provisions of subsections 6(e) and 7(b)) of joint trenches to accommodate Cox's Technology Facilities on or serving such phase or portion of Vistancia (limited, in the case of trenches in the right of way dedicated to City of Peoria, Peoria or other applicable governmental authority, to such Technology Facilities as Cox is permitted by such governmental authority to install in such trenches), which joint trenches shall conform to the route and specifications provided by the APS plans for such trenches (it being agreed that any additional trenching beyond the APS route and specifications that may be necessary to accommodate Cox's Technology Facilities shall be in accordance with the Western States joint Trench Formula and shall be the responsibility of Cox and/or other utility companies in the trench as provided in subsection 6(e) and not the Master Developer or Owner, tenant or other occupant); (3) provided to Cox, without charge, access to any building utility closets or rooms, related HVAC systems, and foundation sleeves.

(iii) **Selection of Contractors.** Cox shall select the Contractors to be used for installation of its portion of the Technology Facilities to be installed by Cox. Cox shall give written notice to Master Developer and the applicable Owner of the selection of Cox's Contractors and Cox will be responsible for providing such Contractors with plans, specifications and design detail for all Technology Facilities Cox installs.

(iv) **Construction & Installation.** Except for Building Conduit that is the responsibility of an Owner as provided in this Agreement, Cox shall be solely responsible for providing, placing, constructing and installing the appropriate Technology Facilities as necessary to provide the full range of Communication Services to Buildings (subject to legal and regulatory restraints), in accordance with applicable law.

(v) **Approvals, Permits & Compliance.** Cox shall be solely responsible for the following with respect to all work performed by Cox or its contractors, agents or employees: all reasonable and legally required consents, approvals, applications, filings, permits, licenses, bonds, insurance, inspections, construction, labor, material, equipment, tools, safety compliance, quality standards compliance, and compliance with all applicable laws, rules and ordinances.

(vi) **Ownership and Maintenance.** Cox at all times shall retain title to and control of the Technology Facilities. The Technology Facilities, or any portion thereof, shall not be considered fixtures, but the personal property of Cox (unless otherwise stipulated to in writing to Cox). Upon termination of this Agreement, Cox shall retain title to and control of the Technology Facilities and, at its option, may either remove the Technology Facilities from Vistancia or leave such Technology Facilities in place at its own cost and expense. Cox shall operate, repair, replace and maintain all Technology Facilities at its own cost and expense.

(f) **Early Termination Upon Cessation of Service.** In the event that Cox is unable to or is otherwise prevented from providing any of the Communication Services by legal or regulatory constraints, Cox or Master Developer shall have the right to terminate this Agreement, in applicable part or in whole, as provided in Section 12, but shall not have the right to seek remedies of specific performance or damages for default.

(g) **Individual Subscriber Basis.** The Communication Services provided by Cox under this Agreement will be provided on an individual subscriber basis. The terms and conditions in the subscriber agreement regarding charges for Communication Services and Customer Premises Equipment (including as to the amount of any deposit, advance payment, rental or purchase of associated Customer Premises Equipment and installation or hookup fees) shall be the same as are generally available from Cox in Peoria and the area of the City of Peoria adjacent to Vistancia and/or as set forth in Cox's tariffs for local exchange as set forth with the Arizona Corporation Commission.

(h) **Billing Subscribers.** Cox will be responsible for billing subscribers for the Communication Services. Cox shall not look to or otherwise hold Master Developer or any Owner liable or responsible in any manner for payment of individual subscriber fees or related costs (except fees for Communication Services provided directly to Master Developer or any Owner as a subscriber will be the responsibility of such subscriber). Cox reserves the right to terminate Communication Services to any subscriber who does not timely pay billed amounts or who otherwise fails to abide by the terms and conditions of its subscriber agreement.

5. **Exclusive Marketing Rights.** During the Term of this Agreement, Cox shall have the following exclusive rights:

(a) **Endorsement by Master Developer.** Master Developer shall endorse Cox exclusively as the preferred provider of the Communication Services to Buildings;

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Cox signed _____ / Developer signed _____

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- (b) **Marketing and Promotion of Communication Services.** Master Developer hereby grants to Cox the exclusive right to market and promote the Communication Services to the Owners of Buildings, which exclusive right shall apply only within any Building constructed by an Owner that purchased from Master Developer the land on which such Building is located.
- (c) **Similar Agreements and Co-Branding.** Master Developer and the Access Entity shall not enter into any arrangements similar to this Agreement, or endorse or engage in promotional or marketing activities of any kind by or for the benefit of any other provider of Communication Services that are equivalent to the Communications Services, excepting only Communication Services that Cox elects not to or is incapable of providing and otherwise as expressly provided herein. Without limiting the foregoing, Master Developer and the Access Entity shall not enter into any agreement which permits the co-branding of the intranet home page or any advertising on the community pages by any provider of Communication Services similar to or equivalent to any of the Communication Services (including any Internet provider or gateway) other than Cox High Speed Internet (residential or commercial).
- (d) Master Developer and the Access Entity will not, either jointly or severally, directly or indirectly, extend to any person access to any Building for the purpose of providing any Communication Services under terms or conditions of access that: (a) provide for compensation which, in the aggregate, allows a lower payment than is provided for the Percentage Fee under this Agreement as set forth in Section 8 (including, without limitation, amendments or supplements thereto, which may subsequent to the date of this Agreement); or (b) provides for any compensation which taken individually (as to an individual Building) allows a lower percent payment than is provided for the Percentage Payment under this Agreement as set forth in Section 8 (including, without limitation, amendments or supplements thereto, which may subsequent to the date of this Agreement), or (c) allow for the provision of any service of a lesser quality than is being offered by Cox pursuant to this CMA. Cox, Master Developer and the Access Entity acknowledge and agree that the rights in this section and other provisions in this CMA are intended to create a level playing field for all Communication Services providers, and not to provide discounts or competitive advantages to Cox.

6. **Technology Facilities Cooperation & Coordination by Master Developer.**

- (a) **Cooperation by Master Developer.** Master Developer shall cooperate and coordinate with Cox in the design, permitting, construction and installation of the Technology Facilities described in Exhibit B and shall establish and implement procedures to facilitate the orderly and efficient design, permitting and construction of the Technology Facilities in Buildings within all phases of development of Vistancia during the Term of this Agreement.
- (b) **Required Owner Provision.** Master Developer shall include provisions in substantially the form of Exhibit A attached hereto in each purchase agreement or option agreement entered into by Master Developer and an Owner during the Term of this Agreement pursuant to which property within Vistancia is conveyed by Master Developer to such Owner for development with one or more Buildings. Master Developer shall cooperate with Cox to the extent enforcement of the Owner's obligations under such provision is required; provided, however, that Master Developer shall not be a required party to any suit or arbitration initiated by Cox seeking to enforce any such Owner obligation. Notwithstanding any contrary provision of this Agreement, Master Developer shall not be responsible or liable for any breach or default by an Owner of its obligations under any provision in Exhibit A, and in no event shall a breach or default by an Owner of its obligations under any provision in Exhibit A constitute a default by Master Developer under this Agreement.
- (c) **Cooperation in use of Utility Easements.** Master Developer shall cooperate with Cox, at Cox's cost and expense, in Cox's efforts to obtain the non-exclusive right to utilize utility (including any technology facilities) easements or similar use rights established pursuant to Plans processed by Master Developer in respect of Vistancia.

- (d) **No Obligation of Cox to Build Sales Centers or Structures.** Cox shall not be obligated to construct or pay for any sales centers or other structures that are constructed or erected for the purpose of displaying Cox marketing materials, as required of Master Developer and/or any Owner in which Technology Facilities are constructed, provided, installed, replaced, repaired and maintained under this Agreement.
- (e) **Cox Trenching Obligations.** Unless otherwise provided for under this Agreement or otherwise due to the failure of Cox to comply with the terms and provisions of this Agreement, Cox shall not be obligated, except as provided for in this subsection (e), to perform or pay for the excavation, opening or closing of any joint trench on or serving any portion of Vistancia, or provide installation of the building sleeves from the joint trenches to any building, all of which shall be and remain solely the responsibility of Master Developer and/or the applicable Owner(s). Notwithstanding any contrary provision hereof, if Cox determines that any trenching is necessary to accommodate Cox's Technology Facilities that is wider than, deeper than, or otherwise beyond or different from the APS route and specifications (such trenching being hereinafter referred to as "Additional Trenching"), then Cox shall reimburse to Master Developer (or the applicable Owner, tenant or other occupant of a Building, if it installs the Additional Trenching) a proportionate share of the cost thereof. Cox shall provide notice to Master Developer and the applicable Owner, tenant or other occupant of the need for any Additional Trenching prior to Master Developer's (or the Owner's, tenant's or other occupant's, as applicable) commencement of construction of the trench that requires any such Additional Trenching. Cox will pay the cost of Additional Trenching based on the Western States joint Trench Formula.

7. Technology Facilities Cooperation & Coordination by Cox.

- (a) **Installation of Technology Facilities.** Cox shall (i) cooperate and coordinate with Master Developer and the applicable Owners in the design and construction of the Technology Facilities described in Exhibit B for those portions of Vistancia that are sold by Master Developer for development of Buildings to Owners through escrows that close during the Term of this Agreement, (ii) commence and complete its design, construction and installation obligations in a timely and effective manner, in accordance with Master Developer's (or the applicable Owner's, tenant's or other occupant's, as applicable) construction schedule for a particular Building (i.e., new construction), and (iii) keep Master Developer and the applicable Owner, tenant or other occupant fully and timely informed throughout the course of design and construction. Notwithstanding the foregoing, the Owner, tenant or other occupant undertaking such construction shall provide Cox with at least six (6) months notice prior to Cox beginning construction so that Cox can obtain adequate capital for such construction. If Cox fails to obtain adequate capital for its construction costs, such Owner, tenant or other occupant shall have the right to permit another telecommunications company to be the preferred provider of the new Building (subject to the limitations in the CSER), in which case the exclusive marketing provisions set forth herein shall not apply to the new Building. Without limitation of the foregoing, Cox shall make the design for the Technology Facilities for any given Building available to Master Developer and, if applicable, the Owner, tenant or other occupant upon completion; provided, however, that in all events Cox must make such design available in sufficient time to accommodate Cox's design within the plans/design for the trench in which the applicable Technology Facilities will be installed. Master Developer and, if applicable, the Owner, tenant or other occupant, shall have five business days to discuss the design with Cox so that the planning and progress of Vistancia or such subdivision will not be interrupted or adversely impacted.
- (b) **Timely Delivery of Plans.** At all times during the Term of this Agreement, and at all relevant times thereafter, Cox will provide to Master Developer or the applicable Owner, tenant or other occupant wiring routing plans for all Technology Facilities that Cox intends to construct and install at Vistancia sufficiently in advance of such planned construction and installation of Technology Facilities so as to permit and facilitate timely and cost-effective coordination and cooperation by the respective parties in the performance of the development work to be performed by each. Master Developer and/or any Owner, tenant or other occupant undertaking construction

of a Building shall provide no less than ten (10) business days notice to Cox of the final date for installation of Technology Facilities within any trench constructed by Master Developer or such Owner, tenant or other occupant. So long as the foregoing notice has been provided, in no event shall Master Developer or any Owner, tenant or other occupant be required or obligated to re-open a completed trench to accommodate the installation of any Technology Facilities, which re-opening shall be the sole responsibility and expense of Cox.

- (c) **Governmental Permits.** Cox will be responsible for obtaining all governmental permits and licenses, zoning variances and other governmental approvals, at Cox's sole cost and expense, that are required for the construction and installation of the Technology Facilities by Cox.
- (d) **Warranty.** Cox makes no warranty, expressed or implied, as to the design or construction of the Technology Facilities, except that Cox represents and warrants that the Technology Facilities installed by Cox:
 - (i) Are owned by Cox without the right of any other person or party to remove or alter the same; and
 - (ii) Shall provide the Communication Services and otherwise satisfy the operating specifications and parameters set forth in this Agreement.
- (e) **Construction Manager.** Cox shall appoint a manager to act as a single point of contact for coordination and cooperative implementation of procedures for resolving day-to-day construction issues with respect to Buildings within Vistancia.
- (f) **Marketing of Commercial Buildings.** Cox will cooperate with Master Developer during the Term to present to potential purchasers or developers of commercial property within Vistancia a selection of arrangements for the provision of Technology Facilities and Communication Services to such properties. Such arrangements may include, but not be limited to, an offering of bulked services at discounted rates, if allowed by law, or an offering of consideration to the purchaser/developer in exchange for exclusive marketing rights. Developer shall use its reasonable efforts to include Cox in discussions with any such potential purchaser/developer in order for Cox to present such selection and initiate direct discussions and negotiations thereof with the potential purchaser/developer.

8. **Payment Obligations.** In consideration for marketing assistance and the other agreements of Master Developer and the Access Entity hereunder, Cox shall pay Master Developer a percentage fee as set forth below ("Percentage Fee"). Cox shall pay Master Developer the Percentage Fee according to the following scale based on the Penetration Percentage (as hereinafter defined) within each Building. The Percentage Fee shall be calculated (and paid by Cox, if owed pursuant to the provisions of this Section 8) separately for each Building within Vistancia that is constructed on land conveyed by Master Developer to an Owner, which building is rented or occupied by an Owner, tenant or other occupant that subscribes to any Cox Communication Service (each such Building being hereinafter referred to as a "Qualifying Building"). As used herein, the term "Penetration Percentage" shall mean, with respect to each Qualifying Building, the percentage amount calculated by dividing the total square footage of the Qualifying Building that is rented or occupied by Owner(s), tenant(s) or other occupant(s) subscribing to Cox Communication Services, divided by the total rentable square footage of that Qualifying Building. For example, if a Qualifying Building contains 100,000 total rentable square feet and has Owners, tenants and other occupants subscribing to Cox Communication Services that occupy 85,000 square feet, then the Penetration Percentage would be equal to 85% and Master Developer would receive a Percentage Fee equal to 3% of MRC with respect to that Qualifying Building.

Penetration Percentage

0% - 74%
75% - 85%
86% - 95%
96% - 100%

Applicable Percentage
Fee

0% of MRC
3% of MRC
4% of MRC
5% of MRC

Once the Penetration Percentage attributed to a particular Qualifying Building increases to a level that would produce a higher Percentage Fee under the above chart, then Master Developer shall be entitled to the higher Percentage Fee, which shall apply to all MRC attributable to that Qualifying Building. If the Penetration Percentage decreases then Master Developer shall be paid the Applicable Percentage Fee, if any, corresponding to the decreased Penetration Percentage.

- (a) **Payments.** All payments of the Percentage Fees shall be payable to Master Developer without demand at the address set forth in the first paragraph of this Agreement, or to such other address as Master Developer may designate. Payments of Percentage Fees shall be made during the Term of this Agreement on a quarterly basis, within ninety (90) days from the end of the prior quarter. If Cox fails to make payments as required herein, Master Developer shall be entitled to interest at the rate of 1% per month until paid.
- (b) **Excluded MRC.** In addition to the exclusion from MRC set forth elsewhere in this Agreement, the provision of Communication Services to state and federal governmental entities and the Franchising Authority shall be excluded from the MRC in calculation of Percentage Fee payments due to Master Developer.

9. **Resale or Lease of Communications Services.** The Parties acknowledge that Cox may be required by federal or state law, to lease or allow use of, portions of the Cox Technology Facilities to third party providers, to allow such providers to provide telecommunications services to Owners, tenants and other occupants of the Buildings. In no event shall the compensation received by Cox from such third party providers be deemed MRC or subject to payment of Percentage Fees under this Agreement. Furthermore, allowing third party providers to deliver telecommunication services or communication signals via the Cox Technology Facilities as described above shall not be deemed an assignment, sale or transfer of the Cox Technology Facilities or a delegation or assignment of Cox's rights.

10. **Insurance; Indemnification; Waiver of Subrogation.**

- (a) **Required Insurance.** During the Term of the Agreement, Cox and Master Developer each shall maintain insurance satisfying the requirements of Exhibit D.
- (b) **Damage or Destruction by Master Developer.** In the event that Master Developer or the agents thereof shall negligently or willfully damage or destroy any Technology Facilities owned by Cox in connection with or arising from the construction or installation of any on-site or off-site improvements, then Master Developer shall reimburse Cox for the cost and expense of repairing the same.
- (c) **Damage or Destruction by Cox.** In the event that Cox or the agents thereof shall negligently or willfully damage or destroy any on-site or off-site improvements in connection with or arising from the construction or installation of any Technology Facilities, then Cox shall reimburse Master Developer for the cost and expense of repairing the same.
- (d) **No Liability for Computer Damage.** Notwithstanding any contrary provision in this Agreement, in no event shall Cox or Master Developer be liable to the other party for any loss, recovery or restoration of any electronically generated or stored data or for damage to computer or any other

technology-related equipment of any such person or entity or any loss of income or revenue resulting therefrom.

- (e) **Waiver of Subrogation.** Notwithstanding any contrary provision of this Agreement, each party to this Agreement hereby waives all rights that it may have against the other to recover for any loss arising out of or incident to occurrence of the perils covered by property and casualty insurance that is required to be carried by each party hereto pursuant to subsection (a), notwithstanding the amount and type of such insurance coverage elected to be carried by such party hereunder or whether or not such party has elected to be self-insured in any amount or to any extent, except with respect to the reimbursement provisions of subsections (b) and (c) above to the extent not covered by insurance; and the parties hereto acknowledge and agree that the intent of this provision is to eliminate any risk of loss or liability to any party who may have caused or created to the detriment of the other party any loss or liability which would have been covered by property insurance and liability insurance if such other party had obtained such insurance coverage (or an adequate amount thereof) in lieu of self-insurance or an inadequate amount of, or coverage under, such insurance) except as noted with respect to subsections (b) and (c).
- (f) **Ownership.** Master Developer represents and warrants that it has fee title to the Vistancia property, subject to all covenants, conditions, restrictions, reservations, easements and declarations or other matters of record or to which reference is made in the public record. Master Developer shall indemnify Cox for any claims, losses, suits, damages (including court costs and attorneys fees) arising out of a breach of this warranty.

11. Representations and Warranties

- (a) **By Master Developer.** Master Developer hereby represents and warrants to Cox as follows:
- (i) **Organization and Authority.** Master Developer is a duly organized limited liability company created under the laws of the State of Delaware, is qualified to engage in business in the State of Arizona, has the requisite power and all required governmental approvals to carry on its present and proposed activities, and has full power, right and authority to enter into this Agreement and to perform each and all of the obligations of Master Developer provided for herein and therein.
- (ii) **Due Execution.** Each person who, in the name of Master Developer, executes this Agreement has been duly authorized to execute this Agreement on behalf of Master Developer.
- (iii) **No Conflict.** Neither the execution and delivery by Master Developer of this Agreement, nor the consummation of the transactions contemplated hereby, is at the time executed in conflict with the governing instruments of Master Developer or any other agreements or instruments to which it is a party or by which it is bound; and as of the Agreement Date, and without otherwise limiting or qualifying the other representations, warranties and covenants of Master Developer under this Agreement, the executive management of Master Developer has no knowledge of any written notice asserting a claim that might reasonably be expected to materially impair the use of the Communication Services.
- (iv) **No Litigation.** There is no litigation served on Master Developer which challenges Master Developer's authority to execute, deliver or perform this Agreement and the executive management of Master Developer has no knowledge of any threatened litigation with respect to such matters.
- (v) **Compliance with Law.** Master Developer is in material compliance with all laws and regulations applicable to Master Developer activities in connection with this Agreement.

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Cox Initial

Developer Initial

COX-00000079

- (vi) **No Conflicting Rights.** Master Developer has granted no exclusive or equivalent rights to any other provider of Communication Services to Buildings within Vistancia that are comparable to Cox's preferred provider status with respect to the Communication Services hereunder, prior to the Agreement Date.

(b) **By Cox.** Cox hereby represents and warrants to Master Developer as follows:

- (i) **Organization and Authority.** Cox is a duly organized corporation created under the laws of the State of Delaware, is qualified to engage in business in the State of Arizona, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to enter into this Agreement and to perform each and all of the obligations of Cox provided for herein and therein.
- (ii) **Due Authorization.** Cox has taken or caused to be taken all requisite corporate action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement.
- (iii) **Due Execution.** Each person who, in the name of Cox, executes this Agreement has been duly authorized to execute this Agreement on behalf of Cox.
- (iv) **No Conflict.** Neither the execution and delivery by Cox of this Agreement nor the consummation of the transactions contemplated hereby is at the time executed in conflict with the governing instruments of Cox or any other agreements or instruments to which it is a party or by which it is bound, and as of the Agreement Date, and without otherwise limiting or qualifying the other representations, warranties and covenants of Cox under this Agreement, the executive management of Cox has no knowledge of any written notice asserting a claim that might reasonably be expected to materially impair the use of the Communication Services.
- (v) **No Litigation.** There is no litigation served on Cox, which challenges Cox's authority to execute, deliver or perform this Agreement, and the executive management of Cox has no knowledge of any threatened litigation with respect to such matters.
- (vi) **Compliance with Law.** Cox is in material compliance with all laws and regulations applicable to Cox's activities in connection with this Agreement.

(c) **By Access Entity.** Access Entity hereby represents and warrants to Cox as follows:

- (i) **Organization and Authority.** Access Entity is a duly organized limited liability company created under the laws of the State of Arizona, is qualified to engage in business in the State of Arizona, has the requisite power and all required governmental approvals to carry on its present and proposed activities, and has full power, right and authority to enter into this Agreement and to perform each and all of the obligations of Access Entity provided for herein and therein.
- (ii) **Due Execution.** Each person who, in the name of Access Entity, executes this Agreement has been duly authorized to execute this Agreement on behalf of Access Entity.
- (iii) **No Conflict.** Neither the execution and delivery by Access Entity of this Agreement, nor the consummation of the transactions contemplated hereby, is at the time executed in conflict with the governing instruments of Access Entity or any other agreements or instruments to which it is a party or by which it is bound, and as of the Agreement Date, and without otherwise limiting or qualifying the other representations, warranties and covenants of Access Entity under this Agreement, the executive management of Access

Entity has no knowledge of any written notice asserting a claim that might reasonably be expected to materially impair the use of the Communication Services.

- (iv) **No Litigation.** There is no litigation served on Access Entity which challenges Access Entity's authority to execute, deliver or perform this Agreement and the executive management of Access Entity has no knowledge of any threatened litigation with respect to such matters.
- (v) **Compliance with Law.** Access Entity is in material compliance with all laws and regulations applicable to Access Entity's activities in connection with this Agreement.
- (vi) **No Conflicting Rights.** Access Entity has granted no exclusive or equivalent rights to any other provider of Communication Services to Buildings within Vistancia that are comparable to Cox's preferred provider status with respect to the Communication Services hereunder, prior to the Agreement Date.

12. Default and Remedies.

- (a) **Events of Default.** Except in case of Unavoidable Delay (in which event the time for performance hereunder shall be extended by the period of time that such Unavoidable Delay exists), each of the following circumstances shall constitute a default under this Agreement, in which case the non-defaulting party shall have the remedies provided below and in Section 11 with respect to the type of default that has occurred:
 - (i) **Monetary Default.** A party shall be in "Monetary Default" upon failure to pay any sum of money due hereunder within 30 days after receipt of written notice that payment is delinquent.
 - (ii) **Performance Default.** A party shall be in "Performance Default" if the party fails to perform any obligation hereunder (other than an obligation which the failure to perform results in a Monetary Default) when performance is due and commence the cure thereof within 30 days of receipt of notice of the failure and diligently prosecute such cure to completion.
- (b) **Remedies for Monetary Default.** In the event of a Monetary Default, the non-defaulting party shall have the right to recover the amount determined to be due in accordance with the applicable dispute resolution procedure of Section 12, together with interest thereon from the date such amount was due until paid at the rate of 12% per annum.
- (c) **Remedies for Performance Default.** In the event of a Performance Default, the nondefaulting party shall have the right to cure on behalf of the defaulting party any default hereunder, and to obtain reimbursement from the defaulting party for the cost of such cure, together with interest thereon from the date such cost was paid until reimbursed at the rate of 12% per annum, in accordance with the applicable dispute resolution procedure of Section 12. The non-defaulting party shall have the right to offset against the amount due any amount then due, or thereafter becoming due, to the defaulting party from the non-defaulting party after such amount has been determined in accordance with the applicable dispute resolution procedure of Section 12.
- (d) **Cox Additional Remedies.** In the event of a Performance Default by Master Developer or Access Entity, Cox shall have the right to collect actual damages, obtain specific performance or injunctive relief in accordance with the applicable dispute resolution procedure of Section 12.
- (e) **Master Developer and Access Entity Additional Remedies.** In the event of a Performance Default by Cox, Master Developer (or Access Entity, as applicable) shall have the right to collect

actual damages, obtain specific performance or injunctive relief in accordance with the applicable dispute resolution procedure of Section 12.

- (f) **Termination.** The non-defaulting party shall have the right to terminate, cancel or rescind this Agreement as provided for in the applicable subsections of Section 12.
- (g) **Monetary Damages.** The non-defaulting shall have no right to obtain monetary damages except as expressly provided in this Section 10.
- (h) **No Consequential Damages.** The defaulting party shall have no liability for incidental, indirect, consequential or punitive damages.
- (i) **CSER and License.** No breach or default under this Agreement by either party shall have any effect upon, nor shall any such breach or default impair or lessen, directly or indirectly, the rights or obligations created by the CSER and the Non-Exclusive License (except in the event of termination of this Agreement due to such default, in which event the rights and obligations of the parties shall be as provided in Section 11 below); the parties hereto representing and acknowledging that the CSER and Non-Exclusive License are independent of this Agreement (subject to the provisions of Section 11 below).

13. **Termination and Partial Termination; Rights of Parties after Termination.**

- (a) **Additional Rights to Terminate.** In addition to termination on expiration of the Initial Term as provided in Section 2 or termination as permitted under Section 10, this Agreement may be terminated or partially terminated under the following circumstances:

- (i) **Cessation or Interruption of Technology Service.** In the event Cox is unable or otherwise fails to provide Video Television Services or Internet Bandwidth Access Service to Buildings within Vistancia or any portion thereof, or in the event Cox is unable or otherwise fails to provide Telephone Services directly or through a third party to Buildings within Vistancia or any portion thereof, or in the event that Cox discontinues providing any such Communication Service for any reason whatsoever, Master Developer shall have the right to terminate this Agreement effective as of the time that Cox ceased to provide the affected Communication Service.

- (ii) **Master Developer Determination.** If Master Developer determines that Cox has failed to provide the Communication Services, or any component thereof (e.g., Internet Bandwidth Access Services, Video Television Services, or Telephone Services) in a timely, satisfactory and/or otherwise consistent with the spirit and intent of this Agreement, Master Developer shall give Cox a written explanation of such determination and the reasons therefor. Cox must respond to Master Developer, in writing, within 10 business days of receipt of such determination and explanation, including an explanation of its response and/or, if applicable, its proposed plan of resolution. Thereafter, within ten (10) business days of Master Developer's receipt of Cox's response, the parties shall meet, in person or telephonically, in order to discuss their differences. Within 10 business days following such meeting (or if Cox is unable or otherwise fails to meet with Master Developer within such 10-business-day period, within 20 business days of Master Developer's receipt of Cox's response, or if Cox failed to timely respond to Master Developer's initial communication, within 30 business days of Cox's receipt of Master Developer's initial determination), Master Developer shall communicate to Cox, in writing, any remaining unresolved issues. Thereafter: (1) Cox may elect to initiate the mediation process provided for in Section 12(a), by notice to Master Developer within 5 business days of receipt of Master Developer's list of unresolved issues, following which mediation process Master Developer may either terminate this Agreement or, if Master Developer does not terminate this Agreement, this Agreement shall remain in full force and effect; or (2) if Cox fails to timely initiate the mediation process provided for in

Section 12(a), and thereafter fails to resolve such issues to Master Developer's reasonable satisfaction within 30 days of receipt of Master Developer's list of unresolved issues, Master Developer shall be entitled to terminate this Agreement by notice of termination to Cox.

- (b) **Continuing Rights & Obligations.** After a termination or partial termination, the continuing rights and obligations of Cox and Master Developer shall be as follows:
- (i) **Termination Upon Default or Other Termination or Expiration.** From and after the expiration or earlier termination of this Agreement (including, but not limited to, any termination due to uncured default): (A) the Non-Exclusive License shall remain in effect with respect to, and Cox shall continue to have the rights of access to, each Building provided by all Platted Easement Areas contained on Plats that have been recorded as of the date of such expiration or termination, and (B) Cox may continue to deliver Communication Service to the Buildings located within such Plats, and install, operate and maintain its Technology Facilities within such Platted Easement Areas, all in accordance with the terms of the Non-Exclusive License. No termination or expiration of this Agreement shall terminate or restrict in any way the rights that Cox has or may have under the Non-Exclusive License or by applicable law or regulation to offer and provide Communication Services to Owners, tenants or other Occupants of buildings located within Plats that have been recorded as of the date of such termination or expiration; but, the Non-Exclusive License shall terminate with respect to, and unless otherwise required by applicable law or regulation, Cox shall have no further right to offer and provide Communication Services or install Technology Facilities within any portion of Vistancia that has not been subjected to or included within a recorded Plat as of the date of such expiration or termination. After termination or expiration, Master Developer authorizes the Access Entity shall have the right to enter into a preferred provider or other similar agreement with another communication services provider, including granting of one or more non-exclusive license agreement(s) on terms that are the same as or different from the Non-Exclusive License; provided that Cox may continue to serve those existing Owners, tenants and other occupants of Buildings described above in this subsection that desire to continue subscribing to Cox's Communications Services.
- (c) **Unwinding.** Upon the expiration or earlier termination of this Agreement, the parties shall take such actions (and otherwise assist each other) in such reasonable and prudent time and manner as is appropriate in order to "unwind" the co-marketing and other relationships established under this Agreement, including, without limitation:
- (i) **Removal of Property.** Within 30 days after the expiration or earlier termination of this Agreement, (1) Cox shall remove any and all of their facilities, equipment, furnishings and other items of personal property which are located within improvements or structures, or otherwise on property, owned by Master Developer or any Owner (except Technology Facilities which Cox deems necessary for delivery of Communication Services to present or future subscribers for any Communication Service which are located within easements granted to Cox or which should have been granted to Cox); and (2) Master Developer shall remove any and all of its facilities, equipment, furnishings and other items of personal property which are located within or on property owned by Cox;
- (ii) **Destruction of Co-Branded Materials.** Each party shall eliminate, destroy and cease the use of any co-branded or joint marketing materials produced under or in accordance with this Agreement; and
- (iii) **Intranet Disconnection.** Cox shall disconnect from the Cox Technology Facilities any electronic connections and/or electronic interfaces with respect to "Vistacomm" and

Master Developer shall remove all of its equipment used in the operation of "Vistacio net" from the property owned by Cox.

14. **Dispute Resolution Mechanisms.**

The parties have agreed on the following mechanisms in order to obtain prompt and expeditious resolution of disputes hereunder. In the event of any dispute, controversy or claim of any kind or nature arising under or in connection with the Agreement and the parties are unable to resolve through informal discussions or negotiations, the parties agree to submit such dispute, controversy or claim to mediation or arbitration in accordance with the following procedures:

- (a) **Mediation.** In the event that there is an unresolved dispute not provided for in any other Section of this Agreement, either party may make written demand for mediation to the other party and to a mediator mutually acceptable to the parties (the "Mediator"). Within five (5) business days after receipt of such demand, the responding party may forward to the Mediator and the initiating party a written response setting forth any other issues and concerns which they believe are relevant to the issues presented for mediation. Unless otherwise agreed, once a demand for mediation has been filed, there shall be no ex parte communications with the Mediator.
- (b) **Information.** A Mediator shall promptly determine if all parties are in possession of adequate information necessary to evaluate the issues and concerns set forth in the demand notice and/or the response thereto (collectively the "Claims"). In the event he deems that they are not, he shall utilize his best efforts to obtain the information in a prompt manner. The Mediator shall immediately prepare and deliver an agenda to both parties within fifteen (15) days after the demand for mediation was received. The Mediator shall then schedule a conference among the parties, to occur within thirty (30) days after the demand for mediation was received. The conference will be attended by the persons most familiar with the issues set forth in the Claims, and by a representative of each party, who is authorized to act on behalf of such party as to reaching an agreement on the Claims. The Mediator shall lead negotiations between the parties upon preparation of a written summary by the Mediator. The proceedings and all documents prepared exclusively for use in these proceedings shall be deemed to be matters pertaining to settlement negotiations, and not subsequently admissible at any further proceeding, except for the summaries of agreements prepared by the Mediator and acknowledged by the parties. The cost of the Mediator shall be borne equally by both parties. Upon a determination by the Mediator that further negotiations are unlikely to achieve further meaningful results, he shall declare the mediation procedure terminated, and any matter not resolved may be referred to arbitration as provided below.
- (c) **Arbitration.** Either party may demand arbitration by giving the other party written notice to such effect, which notice shall (i) describe, in reasonable detail, the nature of the dispute, controversy or claim and (ii) name an arbitrator who is experienced in the subject matter of the issue and dispute. Within ten (10) days after the other party's receipt of such demand, such other party shall name the second arbitrator who is experienced in the subject matter of the issue in dispute. The two arbitrators so named shall select a third arbitrator who is also experienced in the subject matter of the issue in dispute.
- (d) **Costs & Fees.** Master Developer and Cox shall each bear fifty percent (50%) of all fees, costs and expenses of the arbitration, and each party shall bear its own legal fees and expenses, and costs of all experts and witnesses; provided, however, that if the claim by the party is upheld by the arbitration panel and in all material respects, then the arbitration panel may apportion between the parties as the arbitration panel may deem equitable the costs incurred by the prevailing party.
- (e) **Procedure.** The party demanding arbitration shall request the arbitration panel to (i) allow for the parties to request reasonable discovery pursuant to the rules that are in effect under the State of Arizona Superior Court Rules of Civil Procedure for a period not to exceed sixty (60) days prior to such arbitration and (ii) require the testimony to be transcribed.

- (b) Award Final. Any award rendered by the arbitration panel shall be final, conclusive and binding upon the parties and any judgment thereon may be entered and enforced in any court of competent jurisdiction.

15. Assignment.

- (a) No Assignment. Neither Cox nor Master Developer may assign this Agreement or its rights under this Agreement or delegate its responsibilities for performance under this Agreement, and no transfer of this Agreement by operation of law or otherwise shall be effective, without the prior written consent of the other party (which shall not be unreasonably withheld, conditioned or delayed if it occurs prior to the expiration, termination or partial termination of this CMA and which may be withheld in the sole and absolute discretion of the party whose consent is required if it occurs following the expiration, termination or partial termination of this CMA), except as provided in subsections (b) or (c).
- (b) Master Developer. Master Developer shall have the right to assign its right, title and interest (and to be concurrently relieved of related liabilities assumed in writing), without Cox's consent (i) to any other developer in connection with an assignment of substantially all of the then existing interest of Master Developer in Vistancia; (ii) to any entity which has, directly or indirectly, a 30% or greater interest in Master Developer (a "Master Developer Parent") or in which Master Developer or a Master Developer Parent has a 30% or greater interest (a "Master Developer Affiliate"); (iii) to any entity with which Master Developer and/or any Master Developer Affiliate may merge or consolidate; (iv) to a buyer (whether by sale or exchange) of substantially all of the outstanding ownership units of Master Developer; or (v) to the Access Entity or to any other entity that controls the utility easements or other rights in the areas where the Communication Services are located. Any such assignment by Master Developer shall not be effective until the assignee signs and delivers to Cox a document in which the assignee assumes responsibility for all of Master Developer's obligations under this Agreement arising from and after the effective date of assignment and if such assignee has entered into a written agreement, in form reasonably acceptable to Cox, assuming, without condition, reservation or exception, the obligations of Master Developer under this Agreement that are to be performed after the effective date of the assignment, then Master Developer shall be relieved of all responsibility for performance of its obligations under this Agreement which arise after the effective date of the assignment.
- (c) Cox. Cox may assign Cox's interest in this Agreement and in any easement, permit or other assurances of access granted to Cox hereunder or pursuant hereto respecting its Technology Facilities without Master Developer's consent (i) to any entity which has, directly or indirectly, a 30% or greater interest in Cox (a "Parent") or in which Cox or a Parent has a 30% or greater interest (an "Affiliate"); (ii) to any entity with which Cox and/or any Affiliate may merge or consolidate; (iii) to a buyer (whether by sale or exchange) of substantially all of the outstanding ownership units of Cox or any Affiliate; (iv) to a buyer (whether by sale or exchange) of substantially all the assets of Cox used in the operation of Cox's business conducted in Peoria or other applicable governmental authority; or to any transferee of Cox's license (or other legal authority of Cox) to provide Video Television Services to customers in Peoria, upon the franchising authority's approval of any such transfer. Any such assignment shall not be effective until the assignee signs and delivers to Master Developer a document in which the assignee assumes responsibility for all of Cox's obligations under this Agreement arising from and after the effective date of assignment and if such assignee has entered into a written agreement, in form reasonably acceptable to Master Developer, assuming, without condition, reservation or exception, the obligations of Cox under this Agreement that are to be performed after the effective date of the assignment, then Cox shall be relieved of all responsibility for performance of its obligations under this Agreement which arise after the effective date of the assignment.

16. Miscellaneous.

- (a) **Amendments.** No amendment of this Agreement shall be effective unless made in writing executed by both Master Developer and Cox (and by Access Entity, to the extent any such amendment affects or relates to the obligations or agreements of Access Entity hereunder).
- (b) **Integration.** The parties agree that this Agreement, including all exhibits hereto, and the grant of easements or other assurances of access pursuant hereto (including, but not limited to, the Non-Exclusive License), constitute the entire agreement and understanding between Master Developer, the Access Entity and Cox with respect to the subject matter covered thereby and supersede all prior agreements except those referred to herein, representations and understandings, written or oral, between Master Developer, the Access Entity and Cox with respect to such subject matter.
- (c) **Attorneys' Fees.** In the event of any dispute or legal proceeding (including judicial reference and arbitration) between the parties arising out of or relating to this Agreement or its breach, the prevailing party shall be entitled to recover from the non-prevailing party all fees, costs and expenses, including but not limited to attorneys' and expert witness fees and disbursements (and specifically including fairly allocated costs of in-house counsel), incurred in connection with such dispute or legal proceeding, any counterclaims or cross-complaints, any action to confirm, correct or vacate an arbitration award, any appeals and any proceeding to establish and recover such costs and expenses, in such amount as the court, referee or arbitrator determines reasonable. Any party entering a voluntary dismissal of any legal proceeding without the consent of the opposing party in such proceeding shall be deemed the nonprevailing party.
- (d) **Unenforceability.** The determination that any provision of this Agreement is invalid or unenforceable will not affect the validity or enforceability of the remaining provisions or of that provision under other circumstances. Any invalid or unenforceable provision will be enforced to the maximum extent permitted by law.
- (e) **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona.
- (f) **Notices.** Any notice or demand from one party to the other under this Agreement shall be given personally, by certified or registered mail, postage prepaid, return receipt requested, by confirmed fax, or by reliable overnight courier to the address of the other party set forth on the signature page of this Agreement. Any notice served personally shall be deemed delivered upon receipt, served by facsimile transmission shall be deemed delivered on the date of receipt as shown on the received facsimile, and served by certified or registered mail or by reliable overnight courier shall be deemed delivered on the date of receipt as shown on the addressee's registry or certification of receipt or on the date receipt is refused as shown on the records or manifest of the U.S. Postal Service or such courier. A party may from time to time designate any other address for this purpose by written notice to the other party.
- (g) **Relationship of Parties.** The relationship of Master Developer and Cox (and of the Access Entity and Cox) shall be one of independent contractor, not as agent, partner, joint venturer or employee.
- (h) **Third Party Beneficiaries.** Nothing contained in this Agreement is intended or shall be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this Agreement.
- (i) **Waiver.** No waiver by any party of any right or remedy under this Agreement shall be deemed to be a waiver of any other or subsequent right or remedy under this Agreement. The consent by one party to any act by the other party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

- (i) **Writing Required.** No act, delay or omission done, suffered or permitted by one party to this Agreement shall be deemed to waive, exhaust or impair any right, remedy or power of such party hereunder, or to relieve the other party from full performance of its obligations under this Agreement. No waiver of any term, covenant or condition of this Agreement shall be valid unless in writing and signed by the obligee party. No custom or practice between the parties in the administration of the terms of this Agreement shall be construed to waive or lessen the right of a party to insist upon performance by the other party in strict compliance with the terms of this Agreement.
- (j) **Brokerage.** Each party to this Agreement represents and warrants that it has not dealt with any real estate broker or agent or any finder in connection with this Agreement. Each party agrees to indemnify, protect, defend with counsel acceptable to the other party and hold harmless the other party against any claim for commission, finder's fee or like compensation asserted by any real estate broker, agent, finder or other person claiming to have dealt with the indemnifying party in connection with this Agreement.
- (k) **Additional Documents.** Each party hereto shall execute and deliver on such additional instruments as may from time to time be necessary, reasonable and/or appropriate and requested by another party in order to implement and carry out the obligations agreed to hereunder.
- (l) **Continuing Effect.** All covenants, agreements, representations and warranties made in or pursuant to this Agreement shall be deemed continuing and made at and as of the Agreement Date and at and as of all other applicable times during the Term.
- (m) **Meaning of Certain Terms.** When the context so requires in this Agreement, words of one gender include one or more other genders, singular words include the plural, and plural words include the singular. Use of the word "include" or "including" is intended as an introduction to illustrative matters and not as a limitation. References in this Agreement to "Sections" or "subsections" are to the numbered and lettered subdivisions of this Agreement, unless another document is specifically referenced. The word "party" when used in this Agreement means Master Developer, the Access Entity or Cox unless another meaning is required by the context. The word "person" includes individuals, entities and governmental authorities. The words "government" and "governmental authority" are intended to be construed broadly and include governmental and quasi-governmental agencies, instrumentalities, bodies, boards, departments and officers and individuals acting in any official capacity. The word "laws" is intended to be construed broadly and includes all statutes, regulations, rulings and other official pronouncements of any governmental authority and all decrees, rulings, judgments, opinions, holdings and orders of a court, administrative body or a arbitrator.
- (n) **Rules of Construction.** The language in all parts of this Agreement shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against either party. The parties hereto acknowledge and agree that this Agreement has been prepared jointly by the parties and has been the subject of arm's length and careful negotiation, that each party has been given the opportunity to independently review this Agreement with legal counsel, and that each party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of this Agreement, this Agreement shall not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction shall be utilized.
- (o) **Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
- (p) **Proprietary Information.** Each party acknowledges and agrees that any and all information emanating from the other's business in any form is "Confidential Information", and each party agrees that it will not, during or after this Agreement terminates, permit the duplication, use, or

disclosure of any such Confidential Information to any person not authorized by the disclosing party, unless such duplication, use or disclosure is specifically authorized by the other party in writing prior to any disclosure, provided that neither party shall have any obligation with respect to any such information that is, or becomes, publicly known through no wrongful act of such party, or that is rightfully received from a third party without a similar restriction and without breach of this Agreement. Each party shall use reasonable diligence, and in no event less than that degree of care that such party uses in respect to its own confidential information of like nature, to prevent the unauthorized disclosure or reproduction of such information. Without limiting the generality of the foregoing, to the extent that this Agreement permits the copying of Confidential Information, all such copies shall bear the same confidentiality notices, legends, and intellectual property rights designations that appear in the original versions. For the purposes of this Section, the term "Confidential Information" shall not include: information that is in the public domain; information known to the recipient party as of the date of this Agreement as shown by the recipient's written records, unless the recipient party agreed to keep such information in confidence at the time of its receipt; and information properly obtained hereafter from a source that is not under an obligation of confidentiality with respect to such information.

- (v) Recordings. Master Developer agrees to execute and record documents which will establish Cox's easement rights on plats and maps of dedication, by labeling such easements as "D.U.S.S.E" areas in accordance with the terms and conditions of the CSER and Non-Exclusive License, as such documents are prepared by the Master Developer.

Bert

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound hereby, have executed this Property Access Agreement as of the date first written above.

SHEA SUNBELT PLEASANT POINT, LLC, a
Delaware limited liability company

By: Shea Homes Southwest, Inc., an Arizona
corporation, its Member

By: [Signature]
Asst. Sec.

By: Sunbelt Pleasant Point Investors, L.L.C., an
Arizona limited liability company, its Member

By: Sunbelt PP, L.L.P., an Arizona limited
liability limited partnership, its Manager

By: Sunbelt Holdings Management, Inc.,
an Arizona corporation, its General
Partner

By: [Signature]
Curtis E. Smith, its Chief
Operating Officer

Address: 6720 N. Scottsdale Road
Suite 160
Scottsdale, AZ 85253
Phone: (480) 905-0770
Facsimile: (480) 905-1419

and required copy to
8800 N. Gainey Center Drive
Suite 370
Scottsdale, AZ 85258
Phone: (480) 367-7600
Facsimile: (480) 367-2241

Concun Inc., a Delaware corporation,
d/b/a Cox Communications Phoenix

By: [Signature]
Howard Tigerman
Vice President of Business Operations

Address: 20401 North 25th Avenue

Phoenix, AZ 85027
Phone: (623) 322-7137
Facsimile: (623) 322-7918

and required copy to
1400 Lake Hearn Drive
Atlanta, GA 30319
Attn: General Counsel

VISTANCIA COMMUNICATIONS, L.L.C., an
Arizona limited liability company

By: Shea Sunbelt Pleasant Point, LLC, a Delaware
limited liability company, its Manager

By: Shea Homes Southwest, Inc., an Arizona
corporation, its Member

By: 
Asst Sec

By: Sunbelt Pleasant Point Investors, L.L.C., an
Arizona limited liability company, its
Member

By: Sunbelt PP, LLLP, an Arizona
limited liability limited partnership,
its Manager

By: Sunbelt Holdings Management,
Inc., an Arizona corporation, its
General Partner

By: 
Curtis E. Smith, its Chief
Operating Officer

Address: 6720 N. Scottsdale Road
Suite 160
Scottsdale, AZ 85253
Phone: (480) 905-0770
Facsimile: (480) 905-1419

and required copy to
8800 N. Gainey Center Drive
Suite 370
Scottsdale, AZ 85258
Phone: (480) 367-7600
Facsimile: (480) 367-2841

EXHIBIT A

Contract Provision - Purchase and Sale Agreements with Owners

Seller has entered into that certain Property Access Agreement dated _____ 2003 with Coxcom, Inc., a Delaware corporation d/b/a Cox Communications Phoenix ("Cox"), a true and correct copy of which, together with all amendment(s) thereto (if any) that have been executed as of the date of this Agreement (such Property Access Agreement and amendment(s) being hereinafter referred to as the "Agreement") has been provided by Seller to Buyer. Buyer acknowledges and agrees that it is an "Owner" as defined in the Agreement. Buyer hereby agrees that during the term of the Agreement:

- (a) Buyer shall provide substantially the same cooperation and coordination with Cox as agreed to by Seller pursuant to Section 6(a) of the Agreement.
- (b) Buyer shall trench and install for Cox, at Buyer's sole cost and expense, conduit of a size to be determined by Cox ("Building Conduit") running from the Backbone Conduit (as defined in the Agreement) separately to each commercial Building (as defined in the Agreement) constructed by Buyer. Building Conduit shall be owned and maintained by Buyer while the Technology Facilities (as defined in the Agreement) remain the property of Cox. During the Term of the Agreement between Cox and Seller and continuing thereafter for any such time as Cox is providing Communication Services (as defined in the Agreement) to Owners, tenants and other occupants of the Buildings, Cox shall have a right of first refusal to use the Building Conduit for its Technology Facilities to provide Communication Services.
- (c) Buyer shall submit its construction plans to Cox at least six (6) months prior to Cox commencing installation of the Technology Facilities.
- (d) Buyer shall advertise Vistancia in all its media and print materials as a "Cox Digital Community" by including the Cox Digital Community logo (to be provided by Cox);
- (e) Cox shall have the preferred right to provide Communication Services to each Building built by Buyer within the Vistancia project, which shall include the preferred right to market and offer Communication Services to Owners, tenants and other occupants of the Buildings developed by Buyer within the Vistancia project;
- (f) Buyer shall provide, and pay the cost of providing (i) access by Cox to all necessary utility distribution trenches within the Property, which trenches shall comply with the route and specifications provided by the APS plans hereof, and (ii) the building sleeves from utility distribution trenches to each Building constructed by Buyer on the Property. In the case of trenches within rights of way dedicated to City of Peoria, the City of Peoria or other applicable governmental authority, the access described in the preceding item (i) shall apply only to such Technology Facilities as Cox is permitted by City of Peoria, the City of Peoria or applicable governmental authority to install in such trenches;
- (g) Buyer shall give Cox a preferred right to market and offer the Communication Services to tenants and other occupants of the Buildings.

[As used in the foregoing provision, the term "Seller" would refer to Master Developer and the term "Buyer" would refer to the Owner that purchases from Master Developer, and the term "Property" would refer to the real property within Vistancia being purchased by such Owner pursuant to the particular purchase agreement or option agreement.]

EXHIBIT B

Technology Facilities

Technology Facilities are based upon Master Developer's plans as they exist at the time of execution of this Agreement as attached hereto as Exhibit B-1. If Master Developer's plans change subsequent to execution of this Agreement in such a manner that Cox's construction costs would materially increase, Cox may require Master Developer to make a capital contribution toward the installation and construction of the Technology Facilities before Cox is required to construct the Technology Facilities.

Technology Facilities shall be designed and installed to meet the following minimum requirements:

- 1) Network: To Be Determined
- 2) Video Services: Meet or exceed industry standards for programming quantity, and signal quality, of analog and digital video programming.
- 3) Voice Services: Voice services shall be offered in compliance with the ACC Standards of Service, and the CLEC Tariff, with the State of Arizona.
- 4) Data Services: Cox will exercise reasonable care to protect the integrity and security of all network traffic and shall actively monitor for incursions. Data modems shall be compliant with all MCNS/DOCSIS standards and provide for data packet encryption.
- 5) Bandwidth: The network will be capable of delivery in accordance with the Technological & Services Standards established under the FCC and established franchise commitments.

EXHIBIT C
Technology & Service Standards

1. **Standards.** Cox shall, or shall cause its affiliated companies to, develop, deliver and generally maintain the Communication Services in accordance with the following applicable industry benchmark practices and standards ("Technology & Service Standards"):

- (a) Franchise or license requirements imposed by Peoria or other applicable governmental authority, the Federal Communications Commission ("FCC"), the Arizona Corporation Commission ("ACC") or other applicable governmental entities;
- (b) Tariffs on file with the ACC
- (c) Bellcore (including TA-NWT-000909);
- (d) National Cable Television Association; and
- (e) Data Network Standards.

2. **Security.** Data modems shall be compliant with all MCNS/DOCSIS standards and provide for data packet encryption.

3. **Service Response.** Cox must monitor all network components in accordance with applicable standards described in paragraph 1. Cox shall provide credits for service outages in accordance with its Franchise or license requirements imposed by Peoria or other applicable governmental authority, FCC, ACC, or other applicable governmental entities, and as provided in the agreement with the individual subscribers for the provision of service; and such credit shall be reflected on the following period's billing statement; provided that no such credit shall be available where the outage is due to defects or deficiencies in pre-wiring installed by others or failure of a responsible party other than Cox to properly maintain such pre-wiring or due to customer-owned equipment. In no event shall the service standards or credits or remedies be less than those the subscriber is entitled to under the Franchise. Cox will notify Master Developer of significant planned outages under the same conditions in which Cox is mandated by the Franchise authorities to notify the Franchise authorities or the affected customers of such outages and will advise Master Developer of such planned outages no less than 24 hours in advance of the service outage.

EXHIBIT D
Insurance Requirements

Throughout the Term of this Agreement, each party shall maintain the following insurance coverages:

1. Comprehensive Liability. Commercial general liability insurance insuring against claims for bodily and personal injury, death and property damage caused by such party, its employees, agents or contractors providing in the aggregate a minimum combined single limit liability protection of Two Million Dollars (\$2,000,000) per occurrence.
2. Workers Compensation. Workers' Compensation insurance in the statutory amount as required by the laws of the State of Arizona. Such insurance shall include a waiver of subrogation endorsement in favor of the other party.
3. Automobile Liability. Automobile insurance on all vehicles owned or operated by party which are used in any way to fulfill its obligations under this Agreement. Such insurance shall provide a minimum coverage amount of \$1,000,000 combined single limit for bodily injury and property damage.
4. General Provisions. Such insurance coverage shall be maintained under one or more policies of insurance from a recognized insurance company qualified to do business within the Franchise Area and having a Best's rating of not less than A with a financial size of not less than IX. Each party shall furnish evidence of insurance satisfactory to the other prior to the date of this Agreement and thereafter at least ten (10) days prior to the expiration of any insurance coverage required to be maintained hereunder, that insurance coverage required hereunder is in force during the Term of this Agreement.

EXHIBIT C

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for relief from carrier-of-last-resort (COLR) obligations pursuant to Florida Statutes 364.025(6)(d) for two private subdivisions in Nocatee development, by BellSouth Telecommunications, Inc.

DOCKET NO. 060822-TL
ORDER NO. PSC-07-0862-FOF-TL
ISSUED: October 26, 2007

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
MATTHEW M. CARTER II
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER GRANTING PETITION FOR RELIEF
FROM CARRIER-OF-LAST-RESORT OBLIGATION

BY THE COMMISSION:

BACKGROUND

On December 22, 2006, BellSouth Telecommunications, Inc. d/b/a AT&T of the Southeast d/b/a AT&T Florida (AT&T) petitioned for relief from its carrier-of-last-resort (COLR) obligation to provide service at Coastal Oaks, Riverwood, and any other private communities in the development known as Nocatee. Nocatee is a 15,000 acre mixed-use development that spans the southeastern corner of Duval County and the northeast portion of St. Johns County, which will be developed over the next 20 to 25 years. It includes public and private communities. The two above-named private communities will consist of an estimated 1,919 single-family homes, although the initial building phase will consist of a total of 488 homes.

AT&T is seeking a waiver of its COLR obligation pursuant to Section 364.025(6)(d), Florida Statutes, which states:

A local exchange telecommunications company that is not automatically relieved of its carrier-of-last-resort obligation pursuant to subparagraphs (b)1.-4. may seek a waiver of its carrier-of-last-resort obligation from the commission for good cause shown based on the facts and circumstances of provision of service to the multitenant business or residential property. Upon petition for such relief, notice shall be given by the company at the same time to the relevant building owner or

developer. The commission shall have 90 days to act on the petition. The commission shall implement this paragraph through rulemaking.

We denied AT&T's petition using our proposed agency action process, by Order No. PSC-07-0296-PAA-TL, issued April 6, 2007. Because AT&T petitioned for a Section 120.57, Florida Statutes, hearing, we set this matter for an evidentiary proceeding on July 24, 2007.

We took evidence on two issues. The first issue is whether AT&T has demonstrated good cause to be relieved from its COLR obligation to provide voice service to the residents in the private subdivisions in the Nocatee development pursuant to Section 364.025(6)(d), Florida Statutes. The second issue is whether the developer must pay financial consideration to AT&T prior to AT&T installing its network facilities, pursuant to Rule 25-4.067, Florida Administrative Code (F.A.C.), and AT&T's tariffs, and if so, what amount is payable from Nocatee to AT&T. We have jurisdiction pursuant to Section 364.01 and 364.025, Florida Statutes.

LEGAL FRAMEWORK

Section 364.025(6)(d), Florida Statutes, provides in pertinent part that "a local exchange telecommunications company that is not automatically relieved of its carrier-of-last-resort obligation pursuant to subparagraphs (b)1.-4. may seek a waiver of its carrier-of-last-resort obligation from the commission for good cause shown based on the facts and circumstances of provision of service to the multitenant business or residential property." The statute does not define "good cause." As reflected in the parties' briefs, "good cause" is typically defined as "legally sufficient ground or reason." *Black's Law Dictionary* (8th ed. 2004). In this case, "good cause" means legally sufficient ground or reason to conclude that a waiver of a local exchange company's (LEC's) COLR obligation is in the public interest in keeping with the legislative intent generally reflected throughout Chapter 364, Florida Statutes, and specifically, Section 364.025(6), Florida Statutes.

Ultimately, Section 364.025(6)(d), Florida Statutes, grants to the Commission the discretion to determine whether approving a petition for waiver of COLR obligations would best serve the public interest in light of the legislative intent of our enabling statute.

DISCUSSION

AT&T argues that it has shown good cause for COLR relief under the circumstances it faces in this case. AT&T contends that good cause for COLR relief exists when: (1) a developer has entered into an exclusive or near exclusive agreement for video and data services with an alternative provider; (2) a developer expressly or effectively restricts the local exchange company (LEC) to providing voice service only; (3) providers other than the LEC will be or will have the capability of providing voice or voice replacement service to residents; and (4) the provision of voice service by the LEC is uneconomic.

Nocatee argues that Section 364.025(6), Florida Statutes, reflects the continuing legislative intent to preserve to the extent practical, the provision of universal voice service at

reasonable rates to consumers, by a carrier that has the statutory obligation to serve. Moreover, Nocatee asserts that, "for purposes of carrier-of-last-resort relief, the term 'service' means only voice or voice replacement services, which by definition would exclude video and broadband." Nocatee contends that the "language of the statute gives no indication that services beyond voice telephone service are to be considered when determining if the 'good cause' standard has been met."

We disagree that the statute must be read as narrowly as Nocatee suggests. We also do not agree that AT&T's four contentions necessarily define the meaning of good cause, nor do we adopt those contentions as our test for good cause pursuant to Section 364.025(6)(d), Florida Statutes. However, we find here a number of facts and circumstances worthy of consideration in determining whether good cause exists to grant AT&T relief from its COLR obligation. We have thoroughly reviewed the evidentiary record and the arguments of the parties and following are those facts that we consider significant within the context of the totality of the facts and circumstances attendant to this case.¹

Based on the record, we conclude that Nocatee entered into an agreement with Comcast Corporation (Comcast) that effectively makes Comcast the exclusive provider for cable video and data services in the private subdivisions. Although Nocatee denies that the agreement with Comcast is exclusive, we find that Nocatee has entered into a compensation agreement with Comcast wherein Comcast will provide Nocatee with financial consideration in exchange for Nocatee restricting other providers, such as AT&T, from providing cable/video and data services in the private subdivisions. Nocatee will receive a percentage of Comcast's recurring revenue from the provision of voice, data, and video services. If Nocatee allows AT&T to provide video and data services over its network, Comcast has the option to terminate the agreement and the financial consideration that will be paid to Nocatee.

Nocatee is not willing to forego the financial compensation it will receive from Comcast in return for allowing AT&T to provide video and data services in the private subdivisions. In his deposition, Nocatee president, Richard T. Ray, stated, "As long as the agreement that we have right now with Comcast is active, then AT&T will be restricted from providing data and video services. I can't speak to what might happen in the future." Under the contract, Comcast will, in effect, be the only provider for wired cable and data services in the private subdivisions. In addition, Nocatee has effectively restricted AT&T to providing only voice service in the two private subdivisions by means of a proposed voice-only easement. The easement demonstrates, and Nocatee admits, that the rights granted to AT&T specifically exclude delivery of internet/data services, video/television services, or telecommunications services other than voice service at this time.

¹ We emphasize that while we consider the facts identified in our specific findings and holdings in the body of this order to be significant in our determination of good cause, they are significant within the context of the totality of the facts and circumstances of this specific case. These same facts, if found in future cases may or may not carry the same significance, depending on the totality of the circumstances attendant to each individual future case.

There are alternative service providers, other than AT&T, available to the residents of Nocatee. These service providers will have the capability of providing voice or voice replacement service, such as Voice over Internet Protocol (VoIP), to the residents. Nocatee admits that Comcast will be installing its own network to provide voice, data, and video services within the private subdivisions and admits that Comcast has a VoIP service that Comcast intends to offer. Also, Comcast's price list for Jacksonville, Orange Park, Fleming Island, and St. John's County includes Comcast Digital Voice Service. Additionally, AT&T Witness Elizabeth Shiroishi testified that so long as a resident has a broadband connection, he or she could have access to over-the-top VoIP service providers such as Vonage, Skype, or AT&T (CallVantage). Further, it is undisputed that residents will have access to wireless service within the Nocatee area.

Another factor we considered is whether the provision of voice service is uneconomic. AT&T estimated that it would cost at least \$1.8 million, including overhead expense, to deploy its facilities in Nocatee. It is our practice to accept cost estimates, and AT&T's estimate appears to be reasonable. Nocatee asserted that it will not make any financial contribution to offset AT&T's cost to deploy its network. Thus, AT&T would be responsible for the full cost of the facilities.

In addition, we heard testimony about AT&T's potential revenue stream. Although not dispositive, if in five years the amount of exchange revenues collected do not equal or exceed the costs of AT&T's network deployment, then a reasonable argument can be made that the investment might be uneconomic.

AT&T expects to see a take rate of 20% or less, which seems to be a reasonable estimate. AT&T bases this estimate in part on its experience with its known take rate in Avalon, Phase I, another COLR case in which AT&T is the petitioner.² The developments in Nocatee and Avalon, Phase I, share sufficient similarities for the experience in Avalon, Phase I, to serve as a suitable foundation for AT&T's estimated take rate in the two Nocatee private subdivisions.

AT&T's estimated average revenue per unit, which is confidential, is also reasonable. Based on this estimated average revenue per unit and the take rate of 20%, AT&T projects that it would need to produce 2.5 times the projected revenues to recover the cost of its initial investment in five years. Based on these estimates, AT&T would not recover its initial investment for approximately 12 ½ years or more.

² Docket No. 070126-TL – Petition for Relief from carrier-of-last-resort obligation pursuant to Section 364.025(6)(d), Florida Statutes, for Villages of Avalon, Phase II, in Hernando County, by BellSouth Communications, Inc. d/b/a AT&T Florida.

DECISION

Based on a thorough review of the totality of the facts and circumstances presented in this proceeding and strictly limited to the specific fact pattern presented in this proceeding, we find that AT&T has demonstrated good cause for waiver of its COLR obligation in the private subdivisions of the Nocatee development. We find that if in the future the Commission finds that material changes in the facts and circumstances have occurred such that the waiver is not in the public interest, the Commission may reinstate AT&T's carrier-of-last-resort obligation.

Our decision here is not dispositive of future petitions by companies that come before us seeking a waiver of their COLR obligation. When considering whether there is good cause to waive a local exchange telecommunications company's COLR obligation, we shall look at each set of facts and circumstances on a case-by-case basis.

We further find that our decision to grant AT&T's petition for waiver of its COLR obligation renders moot any issue regarding whether AT&T may impose charges on the developer, Nocatee, as a condition of installing facilities.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc. d/b/a AT&T of the Southeast d/b/a AT&T Florida's petition for waiver of its carrier-of-last-resort obligation in two private subdivisions in Nocatee development is hereby granted. It is further

ORDERED that any issue regarding whether AT&T Florida may impose charges on the developer, Nocatee, as a condition of installing facilities, is hereby rendered moot by our decision to grant the waiver. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 26th day of October, 2007.

/s/ Ann Cole

ANN COLE

Commission Clerk

This is an electronic transmission. A copy of the original signature is available from the Commission's website, www.floridapsc.com, or by faxing a request to the Office of Commission Clerk at 1-850-413-7118.

(S E A L)

HFM

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request:

- 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or
- 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

EXHIBIT D

A.C.A. § 23-17-105

West's Arkansas Code Annotated Currentness

Title 23. Public Utilities and Regulated Industries

Subtitle 1. Public Utilities and Carriers (Chapters 1 to 29) (Refs & Annos)Chapter 17. Telephone and Telegraph Companies (Refs & Annos)Subchapter 1. General Provisions (Refs & Annos)


→ § 23-17-105. Exclusion

No telegraph or telephone corporation organized by virtue of the laws of this state or doing business in this state by virtue of the laws of any other state, or of the United States, shall have the power to contract with the owners of lands or the right in lands, or with any person or corporation, for the rights to erect, operate, or maintain telegraph, telephone, or other lines or works for the speedy transmission of intelligence over his or her or its lands, privileges, rights, or easements to the exclusion of other persons or corporations authorized to erect and operate lines and works for speedy transmission of intelligence.

Acts of 1885, Act 107, § 4, p. 176.

Formerly C. & M. Dig., § 10241; Pope's Dig., § 14250; A.S.A. 1947, § 73-1805.

LIBRARY REFERENCES

Telecommunications  267.

Westlaw Key Number Search: 372k267.

C.J.S. Telegraphs, Telephones, Radio, and Television § § 31 to 32.

A.C.A. § 23-17-105, AR ST § 23-17-105

Current through end of 2006 legislation, including changes made by Arkansas Code Revision Commission as a result of 2006 1st Extra. Sess. and Gen. Election held on November 7, 2006.

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END OF DOCUMENT

California Public Utilities Code Section 626

[Legal Research Home](#) > California Lawyer

On or after January 1, 2000, a public utility may not enter into any exclusive access agreement with the owner or lessor of, or a person controlling or managing, a property or premises served by the public utility, or commit or permit any other act, that would limit the right of any other public utility to provide service to a tenant or other occupant of the property or premises.

C.G.S.A. § 16-247c

C

Connecticut General Statutes Annotated Currentness

Title 16. Public Service Companies (Refs & Annos)

■ Chapter 283. Department of Public Utility Control: Telegraph, Telephone, Illuminating, Power and Water Companies (Refs & Annos)

→ § 16-247c. Provision of intrastate telecommunications services. Civil penalty. Competition

(a) No person shall provide intrastate telecommunications services, except for private telecommunications service, commercial mobile telecommunications service to the extent regulated by the federal government and any service authorized under section 16-250a or a joint or shared user tariff approved by the Department of Public Utility Control, unless the person (1) offered, promoted and provided intrastate telecommunications services on or before January 1, 1984, pursuant to a special charter or certificate of public convenience and necessity or (2) is certified to provide intrastate telecommunications services by the Department of Public Utility Control pursuant to sections 16-247f to 16-247h, inclusive.

(b) Each provider of intrastate telecommunications services, as defined in subsection (a) of this section, or any officer, agent or employee thereof, which the department finds has failed to obey or comply with any applicable order made or regulation adopted by the department pursuant to this section shall be fined, by order of the department, not more than ten thousand dollars for each offense. Each distinct violation of any provision of this section or any such order or regulation shall be a separate offense and, in the case of a continued violation, each day thereof shall be deemed a separate offense. The department shall impose any such civil penalty in accordance with the procedure established in section 16-41.

(c) The department shall not prohibit or restrict the competitive provision of intrastate telecommunications services offered by a certified telecommunications provider unless the department finds that the competitive provision of a telecommunications service would be contrary to the goals set forth in section 16-247a, or would not be in accordance with the provisions of section 16-247a or 16-247b, this section, sections 16-247e to 16-247h, inclusive, or section 16-247k.

CREDIT(S)

(1985, P.A. 85-187, § 3, eff. May 23, 1985; 1987, P.A. 87-415, § § 1, 2, eff. June 26, 1987; 1990, P.A. 90-221, § 8, June 12, 1990; 1993, P.A. 93-330, § 3, eff. July 2, 1993; 1994, P.A. 94-83, § 4, eff. July 1, 1994; 1999, P.A. 99-222, § 9, eff. June 29, 1999.)

HISTORICAL AND STATUTORY NOTES

1998 Main Volume

Codification

Section heading was changed to conform to Gen.St., Rev. to 1989.

Gen.St., Rev. to 1995, changed the section heading from "Provision of intrastate interexchange telecommunications service. Compensation for and blocking of unauthorized calls. Civil penalty" to "Provision of intrastate telecommunications services. Civil penalty. Competition".

CROSS REFERENCES

Filing of emergency plans by public service companies, telecommunication companies and municipal

C.G.S.A. § 16-247c

utilities, see C.G.S.A. § 16-32e.

State-wide telecommunications coverage plan, consistency with this section required, see C.G.S.A. § 16-50ee.

UNITED STATES CODE ANNOTATED

Federal Communications Commission regulation of interstate wire and radio communication, see 47 U.S.C.A. § 151 et seq.

C. G. S. A. § 16-247c, CT ST § 16-247c

Current through Gen.St., Rev. to 01-01-2007.

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END OF DOCUMENT

C.G.S.A. § 16-247I



Connecticut General Statutes Annotated Currentness

Title 16. Public Service Companies (Refs & Annos)

▢ Chapter 283. Department of Public Utility Control: Telegraph, Telephone, Illuminating, Power and Water Companies (Refs & Annos)

→ § 16-247I. Access by certified telecommunications providers to occupied buildings: Service, wiring, compensation, regulations, civil penalty

(a) As used in this section, "occupied building" means a building or a part of a building which is rented, leased, hired out, arranged or designed to be occupied, or is occupied (1) as the home or residence of three or more families living independently of each other, (2) as the place of business of three or more persons, firms or corporations conducting business independently of each other, or (3) by any combination of such families and such persons, firms or corporations totaling three or more, and includes trailer parks, mobile manufactured home parks, nursing homes, hospitals and condominium associations.

(b) No owner of an occupied building shall demand or accept payment, in any form, except as provided in subsection (f) of this section, in exchange for permitting a certified telecommunications provider on or within his property or premises, or discriminate in rental charges or the provision of service between tenants who receive such service and those who do not, or those who receive such service from different certified telecommunications providers, provided such owner shall not be required to bear any cost for the installation or provision of such service.

(c) An owner of an occupied building shall permit wiring to provide telecommunications service by a certified telecommunications provider in such building provided: (1) A tenant of such building requests services from that certified telecommunications provider; (2) the entire cost of such wiring is assumed by that certified telecommunications provider; (3) the certified telecommunications provider indemnifies and holds harmless the owner for any damages caused by such wiring; and (4) the certified telecommunications provider complies with all regulations of the Department of Public Utility Control pertaining to such wiring. The department shall adopt regulations, in accordance with the provisions of chapter 54, [FN1] which shall set forth terms which may be included, and terms which shall not be included, in any contract to be entered into by an owner of an occupied building and a certified telecommunications provider concerning such wiring. No certified telecommunications provider shall present to an owner of an occupied building for review or for signature such a contract which contains a term prohibited from inclusion in such a contract by regulations adopted hereunder. The owner of an occupied building may require such wiring to be installed when the owner is present and may approve or deny the location at which such wiring enters such building.

(d) Prior to completion of construction of an occupied building, an owner of such a building in the process of construction shall permit prewiring to provide telecommunications services in such building provided: (1) The certified telecommunications provider complies with all the provisions of subdivisions (2), (3) and (4) of subsection (c) of this section and subsection (f) of this section; and (2) all wiring other than that to be directly connected to the equipment of a telecommunications service customer shall be concealed within the walls of such building.

(e) No certified telecommunications provider may enter into any agreement with the owner or lessee of, or person controlling or managing, an occupied building serviced by such provider, or commit or permit any act, that would have the effect, directly or indirectly, of diminishing or interfering with existing rights of any tenant or other occupant of such building to use or avail himself of the services of other certified telecommunications providers.

(f) The department shall adopt regulations in accordance with the provisions of chapter 54 authorizing certified telecommunications providers, upon application by the owner of an occupied building and approval by the department, to reasonably compensate the owner for any taking of property associated with the installation of wiring

C.G.S.A. § 16-247I

and ancillary facilities for the provision of telecommunications service. The regulations may include, without limitation:

- (1) Establishment of a procedure under which owners may petition the department for additional compensation;
- (2) Authorization for owners and certified telecommunications providers to negotiate settlement agreements regarding the amount of such compensation, which agreements shall be subject to the department's approval;
- (3) Establishment of criteria for determining any additional compensation that may be due;
- (4) Establishment of a schedule or schedules of such compensation under specified circumstances; and
- (5) Establishment of application fees, or a schedule of fees, for applications under this subsection.

(g) Nothing in subsection (f) of this section shall preclude a certified telecommunications provider from installing telecommunications equipment or facilities in an occupied building prior to the department's determination of reasonable compensation.

(h) Any determination by the department under subsection (f) regarding the amount of compensation to which an owner is entitled or approval of a settlement agreement may be appealed by an aggrieved party in accordance with the provisions of section 4-183.

(i) Any person which the Department of Public Utility Control determines, after notice and opportunity for a hearing as provided in section 16-41, has failed to comply with any provision of subsections (b) to (e), inclusive, of this section shall pay to the state a civil penalty of not more than one thousand dollars for each day following the issuance of a final order by the department pursuant to section 16-41 that the person fails to comply with said subsections.

CREDIT(S)

(1994, P.A. 94-106, § 1; 1999, P.A. 99-286, § 2, eff. July 19, 1999.)

[FN1] C.G.S.A. § 4-166 et seq.

HISTORICAL AND STATUTORY NOTES

2007 Electronic Pocket Part Update

Codification

Section heading was changed to conform to Gen.St., Rev. to 2001.

CROSS REFERENCES

State-wide telecommunications coverage plan, consistency with this section required, see C.G.S.A. § 16-50ee.

ADMINISTRATIVE CODE REFERENCES

Telecommunications regulations, see Regs. Conn. State Agencies, § 16-247c-6.

NOTES OF DECISIONS

Compensation 1

C.G.S.A. § 16-247l

1. Compensation

Until the Department of Utility Control adopts regulations implementing a compensation mechanism for the taking of the building owner's property, the mandated access requirements of § 16-247l cannot be enforced. Op.Atty.Gen. No. 95-009 (March 3, 1995), 1995 WL 774638.

C. G. S. A. § 16-247l, CT ST § 16-247l

Current through Gen.St., Rev. to 01-01-2007.

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END OF DOCUMENT

C

Effective: June 7, 2006

West's Florida Statutes Annotated Currentness

Title XXVII. Railroads and Other Regulated Utilities (Chapters 350-368)

☐ Chapter 364. Telecommunications Companies (Refs & Annos)

☐ Part I. General Provisions

→ 364.025. Universal service

(1) For the purposes of this section, the term “universal service” means an evolving level of access to telecommunications services that, taking into account advances in technologies, services, and market demand for essential services, the commission determines should be provided at just, reasonable, and affordable rates to customers, including those in rural, economically disadvantaged, and high-cost areas. It is the intent of the Legislature that universal service objectives be maintained after the local exchange market is opened to competitively provided services. It is also the intent of the Legislature that during this transition period the ubiquitous nature of the local exchange telecommunications companies be used to satisfy these objectives. Until January 1, 2009, each local exchange telecommunications company shall be required to furnish basic local exchange telecommunications service within a reasonable time period to any person requesting such service within the company's service territory.

(2) The Legislature finds that each telecommunications company should contribute its fair share to the support of the universal service objectives and carrier-of-last-resort obligations. For a transitional period not to exceed January 1, 2009, the interim mechanism for maintaining universal service objectives and funding carrier-of-last-resort obligations shall be established by the commission, pending the implementation of a permanent mechanism. The interim mechanism shall be applied in a manner that ensures that each competitive local exchange telecommunications company contributes its fair share to the support of universal service and carrier-of-last-resort obligations. The interim mechanism applied to each competitive local exchange telecommunications company shall reflect a fair share of the local exchange telecommunications company's recovery of investments made in fulfilling its carrier-of-last-resort obligations, and the maintenance of universal service objectives. The commission shall ensure that the interim mechanism does not impede the development of residential consumer choice or create an unreasonable barrier to competition. In reaching its determination, the commission shall not inquire into or consider any factor that is inconsistent with s. 364.051(1)(c). The costs and expenses of any government program or project required in part II of this chapter shall not be recovered under this section.

(3) If any party, prior to January 1, 2009, believes that circumstances have changed substantially to warrant a change in the interim mechanism, that party may petition the commission for a change, but the commission shall grant such petition only after an opportunity for a hearing and a compelling showing of changed circumstances, including that the provider's customer population includes as many residential as business customers. The commission shall act on any such petition within 120 days.

(4)(a) Prior to January 1, 2009, the Legislature shall establish a permanent universal service mechanism upon the effective date of which any interim recovery mechanism for universal service objectives or carrier-of-last-resort obligations imposed on competitive local exchange telecommunications companies shall terminate.

(b) To assist the Legislature in establishing a permanent universal service mechanism, the commission, by February 15, 1999, shall determine and report to the President of the Senate and the Speaker of the House of Representatives the total forward-looking cost, based upon the most recent commercially available technology and equipment and generally accepted design and placement principles, of providing basic local telecommunications service on a basis no greater than a wire center basis using a cost proxy model to be selected by the commission after notice and opportunity for hearing.

(c) In determining the cost of providing basic local telecommunications service for small local exchange telecommunications companies, which serve less than 100,000 access lines, the commission shall not be required to use the cost proxy model selected pursuant to paragraph (b) until a mechanism is implemented by the Federal Government for small companies, but no sooner than January 1, 2001. The commission shall calculate a small local exchange telecommunications company's cost of providing basic local telecommunications services based on one of the following options:

1. A different proxy model; or

2. A fully distributed allocation of embedded costs, identifying high-cost areas within the local exchange area the company serves and including all embedded investments and expenses incurred by the company in the provision of universal service. Such calculations may be made using fully distributed costs consistent with 47 C.F.R. parts 32, 36, and 64. The geographic basis for the calculations shall be no smaller than a census block group.

(5) After January 1, 2001, a competitive local exchange telecommunications company may petition the commission to become the universal service provider and carrier of last resort in areas requested to be served by that competitive local exchange telecommunications company. Upon petition of a competitive local exchange telecommunications company, the commission shall have 120 days to vote on granting in whole or in part or denying the petition of the competitive local exchange company. The commission may establish the competitive local exchange telecommunications company as the universal service provider and carrier of last resort, provided that the commission first determines that the competitive local exchange telecommunications company will provide high-quality, reliable service. In the order establishing the competitive local exchange telecommunications company as the universal service provider and carrier of last resort, the commission shall set the period of time in which such company must meet those objectives and obligations.

(6)(a) For purposes of this subsection:

1. "Owner or developer" means the owner or developer of a multitenant business or residential property, any condominium association or homeowners' association thereof, or any other person or entity having ownership in or control over the property.

2. "Communications service provider" means any person or entity providing communications services, any person or entity allowing another person or entity to use its communications facilities to provide communications services, or any person or entity securing rights to select communications service providers for a property owner or developer.

3. "Communications service" means voice service or voice replacement service through the use of any technology.

(b) A local exchange telecommunications company obligated by this section to serve as the carrier of last resort is not obligated to provide basic local telecommunications service to any customers in a multitenant business or residential property, including, but not limited to, apartments, condominiums, subdivisions, office buildings, or office parks, when the owner or developer thereof:

1. Permits only one communications service provider to install its communications service-related facilities or equipment, to the exclusion of the local exchange telecommunications company, during the construction phase of

the property;

2. Accepts or agrees to accept incentives or rewards from a communications service provider that are contingent upon the provision of any or all communications services by one or more communications service providers to the exclusion of the local exchange telecommunications company;

3. Collects from the occupants or residents of the property charges for the provision of any communications service, provided by a communications service provider other than the local exchange telecommunications company, to the occupants or residents in any manner, including, but not limited to, collection through rent, fees, or dues; or

4. Enters into an agreement with the communications service provider which grants incentives or rewards to such owner or developer contingent upon restriction or limitation of the local exchange telecommunications company's access to the property.

(c) The local exchange telecommunications company relieved of its carrier-of-last-resort obligation to provide basic local telecommunications service to the occupants or residents of a multitenant business or residential property pursuant to paragraph (b) shall notify the commission of that fact in a timely manner.

(d) A local exchange telecommunications company that is not automatically relieved of its carrier-of-last-resort obligation pursuant to subparagraphs (b)1.-4. may seek a waiver of its carrier-of-last-resort obligation from the commission for good cause shown based on the facts and circumstances of provision of service to the multitenant business or residential property. Upon petition for such relief, notice shall be given by the company at the same time to the relevant building owner or developer. The commission shall have 90 days to act on the petition. The commission shall implement this paragraph through rulemaking.

(e) If all conditions described in subparagraphs (b)1.-4. cease to exist at a property, the owner or developer requests in writing that the local exchange telecommunications company make service available to customers at the property and confirms in writing that all conditions described in subparagraphs (b)1.-4. have ceased to exist at the property, and the owner or developer has not arranged and does not intend to arrange with another communications service provider to make communications service available to customers at the property, the carrier-of-last-resort obligation under this section shall again apply to the local exchange telecommunications company at the property; however, the local exchange telecommunications company may require that the owner or developer pay to the company in advance a reasonable fee to recover costs that exceed the costs that would have been incurred to construct or acquire facilities to serve customers at the property initially, and the company shall have a reasonable period of time following the request from the owner or developer to make arrangements for service availability. If any conditions described in subparagraphs (b)1.-4. again exist at the property, paragraph (b) shall again apply.


(f) This subsection does not affect the limitations on the jurisdiction of the commission imposed by s. 364.011 or s. 364.013.

CREDIT(S)

Added by Laws 1995, c. 95-403, § 7, eff. Jan. 1, 1996. Amended by Laws 1997, c. 97-100, § 18, eff. July 1, 1997; Laws 1998, c. 98-277, § 1, eff. May 28, 1998; Laws 1999, c. 99-354, § 1, eff. June 11, 1999; Laws 2000, c. 2000-289, § 1, eff. June 14, 2000; Laws 2000, c. 2000-334, § 2, eff. June 20, 2000; Laws 2003, c. 2003-32, § 4, eff. May 23, 2003; Laws 2006, c. 2006-80, § 2, eff. June 7, 2006.

LIBRARY REFERENCES

1998 Main Volume

Telecommunications  267.
Westlaw Topic No. 372.
C.J.S. Telegraphs, Telephones, Radio, and Television § 267.

RESEARCH REFERENCES


Encyclopedias

Universal Service, FL Jur. 2d Telecommunications § 13.

NOTES OF DECISIONS

Operator costs 1

1. Operator costs

Incumbent local exchange carrier (ILEC) which was statutorily precluded from offering local service without operators to consumers was not required to eliminate its cost of operator services from wholesale rate it charged competitor local exchange carrier (CLEC), which sought to obtain local service from ILEC for resale but wanted to provide its own operator services. AT&T Communications of Southern States, Inc. v. BellSouth Telecommunications, Inc., C.A.11 (Fla.)2001, 268 F.3d 1294. Telecommunications  866

West's F. S. A. § 364.025, FL ST § 364.025

Current through Chapter 339 and S.J.R. 2D (End) of the 2007 Special D Session of the Twentieth Legislature

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West's Annotated Indiana Code Currentness

Title 8. Utilities and Transportation

■ Article 1. Utilities Generally (Refs & Annos)

→ Chapter 32.6. Access to Real Property by Communications Service Providers

8-1-32.6-1 "Commission" defined

Sec. 1. As used in this chapter, "commission" refers to the Indiana utility regulatory commission created by IC 8-1-1-2.

8-1-32.6-2 "Communication service" defined

Sec. 2. (a) As used in this chapter, "communications service" refers to any of the following:

- (1) Telecommunications service (as defined in 47 U.S.C. 153(46)).
- (2) Information service (as defined in 47 U.S.C. 153(20)).

(b) The term includes:

- (1) video service (as defined in IC 8-1-34-14);
- (2) broadband service;
- (3) advanced services (as defined in 47 CFR 51.5); and
- (4) Internet Protocol enabled services;

however classified by the Federal Communications Commission.

8-1-32.6-3 "Communications service provider" defined

Sec. 3. As used in this chapter, "communications service provider" means a person or an entity, or an affiliate (as defined in IC 8-1-34-1) of a person or an entity, that offers communications service to customers in Indiana, without regard to the technology or medium used by the person or entity to provide the communications service. The term includes a provider of commercial mobile service (as defined in 47 U.S.C. 332).

8-1-32.6-4 "Multitenant real estate" defined

Sec. 4. As used in this chapter, "multitenant real estate" means any:

- (1) geographic area;
- (2) building; or
- (3) group of buildings;

containing more than one (1) unit for business purposes. The term includes office buildings and office parks. The

term does not include apartment buildings, condominiums, or subdivisions.

8-1-32.6-5 "Person" defined

Sec. 5. As used in this chapter, "person" means an individual, a corporation, a limited liability company, a partnership, an unincorporated association, or a governmental entity.

8-1-32.6-6 "Provider of last resort" defined

Sec. 6. As used in this chapter, "provider of last resort" has the meaning set forth in IC 8-1-32.4-9.

8-1-32.6-7 Prohibited contracts, agreements, or arrangements; violations and civil penalties; appeal from commission determination

Sec. 7. (a) After March 27, 2006, a communications service provider shall not enter into any contract, agreement, or other arrangement that does any of the following:

(1) Requires any person to restrict or limit:

(A) the ability of another communications service provider to obtain easements or rights-of-way for the installation of facilities or equipment used to provide communications service to Indiana customers; or

(B) access to real property by another communications service provider.

(2) Offers or grants incentives or rewards to an owner of real property if the incentives or rewards are contingent upon the property owner's agreement to restrict or limit:

(A) the ability of another communications service provider to obtain easements or rights-of-way for the installation of facilities or equipment used to provide communications service on the property; or

(B) access to the owner's real property by another communications service provider.

A contract, an agreement, or any other arrangement that violates this section is void if the contract, agreement, or arrangement is entered into after March 27, 2006. However, a contract, an agreement, or any other arrangement that otherwise violates this section remains in effect until such time as it would normally terminate or expire if the contract, agreement, or arrangement is entered into before March 28, 2006.

(b) This section does not prohibit a communications service provider and a subscriber from entering into any lawful contract, agreement, or other arrangement concerning the communications service offered by the communications service provider to the subscriber.

(c) Upon:

(1) a complaint filed by:

(A) another communications service provider;

(B) a subscriber or potential subscriber of communications service;

(C) the utility consumer counselor; or

----- (D) any class satisfying the standing requirements of IC 8-1-2-54; or -----

(2) the commission's own motion;

the commission may investigate whether a communications service provider has violated this section. If, after notice and an opportunity for hearing, the commission determines that the communications service provider has violated this section, the commission may issue an order imposing a civil penalty of not more than five hundred dollars (\$500) for each violation. For purposes of this subsection, each day that a contract, an agreement, or an arrangement prohibited by this section remains in effect constitutes a separate violation.

(d) The attorney general may bring an action in the name of the state to enforce an order of the commission under subsection (c), including the collection of an unpaid civil penalty imposed by the commission.

(e) Civil penalties collected under this section shall be deposited in the state general fund.

(f) A determination by the commission under this section is subject to appeal under IC 8-1-3.

8-1-32.6-8 Provision of services to occupants of multitenant real estate

Sec. 8. (a) Notwithstanding IC 8-1-32.4-14, the commission may not require a communications service provider, including a provider of last resort, to provide any communications service to the occupants of multitenant real estate if the owner, operator, or developer of the multitenant real estate does any of the following to the benefit of another communications service provider:

(1) Permits only one (1) communications service provider to install the provider's facilities or equipment during the construction or development phase of the multitenant real estate.

(2) Accepts or agrees to accept incentives or rewards that:

(A) are offered by a communications service provider to the owner, operator, developer, or occupants of the multitenant real estate; and

(B) are contingent upon the provision of communications service by that provider to the occupants of the multitenant real estate, to the exclusion of any services provided by other communications service providers.

(3) Collects from the occupants of the multitenant real estate any charges for the provision of communications service to the occupants, including charges collected through rent, fees, or dues.

(4) Enters into an agreement with a communications service provider that is prohibited by section 7 of this chapter.

(b) This subsection applies to a communications service provider that is relieved under subsection (a) of an obligation to provide communications service to the occupants of multitenant real estate. This section does not prohibit the communications service provider from voluntarily offering service to the occupants of the multitenant real estate. However, the commission shall not exercise jurisdiction over the terms, conditions, rates, or availability of any communications service voluntarily offered by a communications service provider under this subsection.

8-1-32.6-9 Prohibited actions by owner, operator, or developer of multitenant real estate

Sec. 9. (a) Except as provided in subsection (b), the owner, operator, or developer of multitenant real estate located in a service area in which one (1) or more communications service providers are authorized to provide communications service may not do any of the following:

(1) Prevent a communications service provider from installing on the premises communications service equipment

that an occupant requests.

(2) Interfere with a communications service provider's installation on the premises of communications service equipment that an occupant requests.

(3) Discriminate against a communications service provider or impose unduly burdensome conditions on the terms, conditions, and compensation for a communications service provider's installation of communications service equipment on the premises.

(4) Demand or accept an unreasonable payment from:

(A) an occupant; or

(B) a communications service provider;

in exchange for allowing the communications service provider access to the premises.

(5) Discriminate against or in favor of an occupant in any manner, including charging higher or lower rental charges to the occupant, because of the communications service provider from which the occupant receives communications service.

(b) This section does not prohibit the owner, operator, or developer of multitenant real estate from doing any of the following:

(1) Imposing a condition on a communications service provider that is reasonably necessary to protect:

(A) the safety, security, appearance, or condition of the property; or

(B) the safety and convenience of other persons.

(2) Imposing a reasonable limitation on the hours during which a communications service provider may have access to the premises to install communications service equipment.

(3) Imposing a reasonable limitation on the number of communications service providers that have access to the premises, if the owner, operator, or developer can demonstrate a space constraint that requires the limitation.

(4) Requiring a communications service provider to agree to indemnify the owner, operator, or developer for damage caused by installing, operating, or removing communications service equipment on or from the premises.

(5) Requiring an occupant or a communications service provider to bear the entire cost of installing, operating, or removing communications service equipment.

(6) Requiring a communications service provider to pay compensation for access to or use of the premises, as long as the compensation is:

(A) reasonable; and

(B) nondiscriminatory;

among communications service providers.

(c) For purposes of this subsection, an "affected person" includes the following:

(1) An occupant that is a current or potential subscriber of communications service on the premises of multitenant real estate.

(2) A unit in which multitenant real estate is located, acting on behalf of:

(A) a person described in subdivision (1); or

(B) other similarly situated persons.

(3) A communications service provider.

An affected person that alleges a violation of this section by the owner, operator, or developer of multitenant real estate may seek equitable or compensatory relief in a court having jurisdiction. The party prevailing in any action filed under this section is entitled to recover the costs of the action, including reasonable attorney's fees as determined by the court.

8-1-32.6-10 Adoption of rules

Sec. 10. The commission may adopt rules under IC 4-22-2 to implement this chapter.

Current through the 2007 Public Laws approved and effective through April 27, 2007.
END OF DOCUMENT

CKANSAS STATUTES ANNOTATEDCHAPTER 58.--PERSONAL AND REAL PROPERTYARTICLE 25.--LANDLORDS AND TENANTSRESIDENTIAL LANDLORD AND TENANT ACT58-2553. Duties of landlord; agreement that tenant perform landlord's duties; limitations.

(a) Except when prevented by an act of God, the failure of public utility services or other conditions beyond the landlord's control, the landlord shall:

(1) Comply with the requirements of applicable building and housing codes materially affecting health and safety. If the duty imposed by this paragraph is greater than any duty imposed by any other paragraph of this subsection, the landlord's duty shall be determined in accordance with the provisions of this paragraph;

(2) exercise reasonable care in the maintenance of the common areas;

(3) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating and air-conditioning appliances including elevators, supplied or required to be supplied by such landlord;

(4) except where provided by a governmental entity, provide and maintain on the grounds, for the common use by all tenants, appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and

(5) supply running water and reasonable amounts of hot water at all times and reasonable heat, unless the building that includes the dwelling units is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection. Nothing in this section shall be construed as abrogating, limiting or otherwise affecting the obligation of a tenant to pay for any utility service in accordance with the provisions of the rental agreement. The landlord shall not interfere with or refuse to allow access or service to a tenant by a communication or cable television service duly franchised by a municipality.

(b) The landlord and tenants of a dwelling unit or units which provide a home, residence or sleeping place for not to exceed four households having common areas may agree in writing that the tenant is to perform the landlord's duties specified in paragraphs (4) and (5) of subsection (a) of this section and also specified repairs, maintenance tasks, alterations or remodeling, but only if the transaction is entered into in good faith and not for the purpose of evading the obligations of the landlord.

(c) The landlord and tenant of any dwelling unit, other than a single family residence, may agree that the tenant is to perform specified repairs, maintenance tasks, alterations or remodeling only if:

(1) The agreement of the parties is entered into in good faith, and not to evade the obligations of the landlord, and is set forth in a separate written agreement signed by the parties and supported by adequate consideration;

(2) the work is not necessary to cure noncompliance with subsection (a)(1) of this section; and

(3) the agreement does not diminish or affect the obligation of the landlord to other tenants in the premises.


(d) The landlord may not treat performance of the separate agreement described in subsection (c) of this section as a condition to any obligation or the performance of any rental agreement.

History: L. 1975, ch. 290, § 14; L. 1982, ch. 230, § 2; July 1.

LSA-R.S. 45:781

CWest's Louisiana Statutes Annotated Currentness

Louisiana Revised Statutes

Title 45. Public Utilities and Carriers (Refs & Annos) Chapter 8. Telegraphs and Telephones (Refs & Annos)**→ § 781. Lines; right to use public property; railroad property; waters; roads and streets; private property; expropriation; excluding lines of competitors; franchising of cable television by parishes**

A. Corporations, domestic or foreign, formed for the purpose of transmitting intelligence by telegraph or telephone or other system of transmitting intelligence, may construct and maintain telegraph, telephone or other lines necessary to transmit intelligence along all public roads or public works, and along and parallel to any of the railroads in the state, and along and over the waters of the state, if the ordinary use of the roads, works, railroads, and waters are not obstructed, and along the streets of any city, with the consent of the city council or trustees. Such companies, shall be entitled to the right of way over all lands belonging to the state and over the lands, privileges and servitudes of other persons, and to the right to erect poles, piers, abutments, and other works necessary for constructing and maintaining lines and works, upon making just compensation therefor. If the company fails to secure such right by consent, contract or agreement upon just and reasonable terms, then the company has the right to proceed to expropriate as provided by law for railroads and other works of public utility, but shall not impede the full use of the highways, navigable waters, or the drainage or natural servitudes of the land over which the right of way may be exercised. No company, operating under the provisions of this Section, shall contract with the owners of land or with any other corporation for the right to erect and maintain any telephone, telegraph or other line for transmission of intelligence over its lands, privileges or servitudes, to the exclusion of the lines of other companies operating under the provisions of this Section.

B. Nothing provided in Section A herein shall affect the right granted to parish governing authorities to grant franchises for the regulation of cable television outside municipalities.

CREDIT(S)

Amended by Acts 1976, No. 573, § 2.

HISTORICAL AND STATUTORY NOTES

1982 Main Volume

Source:

R.S.1870, § § 696, 3760.

Acts 1880, No. 124, § 1.

The 1976 amendment designated the prior subject matter of this section as subsection A; added subsection B; and added "franchising of cable television by parishes" to the section heading.

Prior Laws:

Acts 1855, No. 105, § 1.

R.S.1856, p. 116, § 16.

CROSS REFERENCES

Obscene or indecent language, penalty for use in telephone conversation, see R.S. 14:285.

NV
NAC 704.68098 Exclusive rights to owner or developer of property or subdivision prohibited. (NRS 703.025, 704.210)

1. A provider of telecommunication service may not obtain the exclusive rights from a developer or owner of property to provide facilities required to offer basic service to subscribers occupying that property or a subdivision thereof.

2. As used in this section, "subscriber" has the meaning ascribed to it in NAC 704.7521.

(Added to NAC by Pub. Service Comm'n, eff. 7-10-96)

NAC 704.7521 "Subscriber" defined. (NRS 703.025, 704.210) "Subscriber" means a customer of a provider of telecommunication service or a user of telecommunication service.

(Added to NAC by Pub. Service Comm'n, 7-16-85, eff. 8-1-85; A 10-25-95)

NC **R20-02 FAIR COMPETITION AMONG LOCAL TELECOMMUNICATIONS SERVICE PROVIDERS**

(a) For purposes of this rule, the following definitions shall apply:

- (1) "Development" means a residential subdivision, office park, shopping center or other area with clearly defined boundaries being developed as a unified entity by one or more landlords or developers.
- (2) "Electing provider" means a preferred provider that has chosen to make subloops available to competitors pursuant to subsections (f) and (h) of this rule.
- (3) "Exclusive access provisions" are provisions of a preferred provider contract that prohibit the developer, manager, owner or other party controlling access to a development from allowing competitors of the preferred provider to enter upon the development premises or easements and rights-of-way appurtenant thereto, or provisions of a preferred provider contract that require the developer, manager, owner or other party controlling access to a development to impose restrictions or requirements on such third party access which are not imposed on the preferred provider and which are anticompetitive in nature.
- (4) "Exclusive provisioning provisions" are provisions of a preferred provider contract that prohibit the developer, manager, owner or other party controlling access to a development from allowing competitors of the preferred provider to provide services in a development or provisions of a preferred provider contract that require the developer, manager, owner or other party controlling access to a development to impose restrictions or requirements on the provisioning of such third party service which are not imposed on the preferred provider and which are anticompetitive in nature.
- (5) "Exempted provider" means a preferred provider that is a local exchange company and is not required under federal law to make subloops available to its competitors, or a preferred provider that is a competing local provider and would not, if it were a local exchange company, be required to make subloops available to its competitors.
- (6) "Local service provider" includes any competing local provider, as defined in G.S. 62-3(7a), and any local exchange company, as defined in G.S. 62-3(16a).
- (7) "Preferred provider" means a local service provider that has entered into a preferred provider contract.
- (8) "Preferred provider contract" means a contract between a particular local service provider and the owner or developer of a development, giving the preferred provider special status or rights not available to other local service providers.
- (9) "Weighted commission provisions" are provisions of a preferred provider contract providing for the payment of commissions to an owner or developer that (A) are based on the number of customers in the development who purchase service from the preferred provider, or (B) are based on a percentage of the revenues received by the preferred provider from customers in the development, or (C) otherwise provide a financial incentive for the owner or developer to exclude competitors of the preferred provider from the development.

(b) Exclusive provisioning provisions in preferred provider contracts are anticompetitive and void.

(c) Exclusive access provisions in preferred provider contracts are anticompetitive and void.

(d) Weighted commission provisions in preferred provider contracts are contrary to public policy and void, except as provided in subsections (f) and (g) below.

(e) Every preferred provider shall file with the Commission a Preferred Provider Notice. There shall be a single notice for each preferred provider, rather than separate notices for each development where a preferred provider contract exists. The notice shall comply with the following requirements:

- (1) For each development where the provider has entered into, or will enter into, a preferred provider contract, the Preferred Provider Notice shall provide the following information:
 - (A) The name and location of the development.
 - (B) The identity of the parties to the contract.
 - (C) The identity of the local exchange company, if any, in whose franchise area the development is located.
 - (D) Whether the contract includes exclusive provisioning provisions.
 - (E) Whether the contract includes exclusive access provisions.
 - (F) Whether the contract includes weighted commission provisions, and if so, whether the provider is filing an Electing Provider Attachment under subsection (f) of this rule or an Exempted Provider Attachment under subsection (g) of this rule.

- (2) The Preferred Provider Notice shall be filed within 21 days after the effective date of this rule, if the provider is a party to any existing preferred provider contract. Before entering into any new preferred provider contract, a local service provider shall file an updated Preferred Provider Notice (or a new notice, if it has not filed such a notice previously) containing the information provided in subdivision (1) above with respect to the new preferred provider contract. Before amending any preferred provider contract in a manner that affects the information in the Preferred Provider Notice, a local service provider shall file an updated Preferred Provider Notice.

(f) A preferred provider may become an electing provider by filing with the Commission an Electing Provider Attachment that meets the requirements of subdivisions (1) through (3) below. An electing provider, within the developments specified in its Electing Provider Attachment, may enter into preferred provider contracts containing weighted commission provisions and may continue to enforce existing preferred provider contracts containing such provisions.

- (1) The Electing Provider Attachment shall be attached to the electing provider's Preferred Provider Notice. It shall identify the name and location of each development to which it is applicable.
- (2) The Electing Provider Attachment shall state that within the developments to which it applies, the electing provider will make unbundled subloops available to its competitors pursuant to this rule. It shall specify the basic terms under which subloops will be offered, and such terms shall be consistent with this rule and any applicable orders of the Commission.
- (3) The Electing Provider Attachment may be updated to specify additional developments to which it is applicable. Any such update shall be filed before the electing provider enters into any preferred provider contract with weighted commission provisions relating to any of the additional developments.

(g) A preferred provider may become an exempted provider by filing with the Commission an Exempted Provider Attachment that meets the requirements of subdivisions (1) through (3) below. An exempted provider, within the developments specified in its Exempted Provider Attachment, may enter into preferred provider contracts containing weighted commission provisions and may continue to enforce existing preferred provider contracts containing such provisions.

- (1) The Exempted Provider Attachment shall be attached to the exempted provider's Preferred Provider Notice. It shall identify the name and location of each development to which it is applicable.
- (2) The Exempted Provider Attachment shall state either (A) that the exempted provider is a local exchange company and is not required by federal law to make subloops available to competitors in any of the developments to which the attachment is applicable, or (B) that the exempted provider is a competing local provider, and if it were a local exchange company, it would not be required by federal law to make subloops available to competitors in any of the developments to which the attachment is applicable.
- (3) The Exempted Provider Attachment may be updated to specify additional developments to which it is applicable. Any such update shall be filed before the exempted provider enters into any preferred provider contract with weighted commission provisions relating to any of the additional developments. For each development for which exemption is asserted in an initial or updated Exempted Provider Attachment, the provider shall submit an affidavit, signed by an engineer with direct personal knowledge of the facilities serving the development, that specifies with particularity the provider's factual and legal basis for asserting the exemption.
- (4) A local service provider may challenge an Exempted Provider Attachment by filing a petition seeking review of such Attachment with the Commission. In the event of such a challenge, the Public Staff shall investigate such challenge and file its report and recommendations concerning the merits of such challenge within 30 days of the filing of the challenge. The party asserting exemption shall bear the burden of demonstrating entitlement to the exemption by clear and convincing evidence. Any such challenge shall, to the extent practicable, be given priority on the Commission's docket.

(h) No local service provider may maintain a preferred provider contract in effect in any development unless it has duly filed with the Commission a Preferred Provider Notice that makes reference to the development, together with any applicable Electing Provider Attachment or Exempted Provider Attachment.

(i) Preferred Provider Notices, Electing Provider Attachments and Exempted Provider Attachments shall be subject to the following filing requirements:

- (1) Each preferred provider shall file its Preferred Provider Notice, together with any Attachments, in a docket to be designated by the Commission.
 - (2) The first Preferred Provider Notice filed by a particular preferred provider shall be labeled "Preferred Provider Notice – Version 1." The first updated Preferred Provider Notice filed by such provider shall be labeled "Preferred Provider Notice – Version 2," and subsequent updates shall be numbered sequentially.
 - (3) Whenever an Electing Provider Attachment or Exempted Provider Attachment is updated, the provider shall file an update of the entire Preferred Provider Notice, including the Attachments, with a new version number, even if the only changes are in one of the Attachments.
- (j) When a competing local provider that is an electing provider receives a request from a competitor for subloops in a given development, the parties shall negotiate in good faith. If they are not able to reach agreement, the following requirements shall apply:
- (1) The subloops shall be provisioned within the same time period that the local exchange company in whose franchise area the development is located makes subloops available. If no such period exists, such subloops shall be provisioned within seven days.
 - (2) At any point 60 or more days after the receipt of a bona fide request for subloop interconnection, either party may request the Commission to set a subloop rate for the electing provider.
 - (3) There is a rebuttable presumption that the appropriate rate for a subloop is the applicable subloop rate of the local exchange company in whose franchise area the development is located. If there is no such rate in existence, then the rebuttably presumptive subloop rate is BellSouth's Zone 1 subloop rate.
 - (4) The party seeking a departure from the rebuttably presumptive subloop rate shall have the burden of proof to demonstrate that such rate is not just and reasonable.
 - (5) The Commission will fix the subloop rates for a competing local provider that is an electing provider on a company-wide basis in an initial contested proceeding. If the rate fixed by the Commission is different from the rate previously being paid by the subloop purchaser in the contested proceeding, a true-up shall be performed.
- (k) Every preferred provider, within the development to which its preferred provider contract applies, shall make its service available to competitors for resale. If the preferred provider is a competing local provider, the following requirements shall apply:
- (1) Unless the competing local provider and the reseller agree on a different rate, the wholesale discount percentage offered by the competing local provider shall be the same wholesale discount percentage offered by the local exchange company in whose franchise area the development is located. If no such wholesale discount percentage has been determined, the discount percentage established for BellSouth in Docket No. P-140, Sub 50 shall apply.
 - (2) If either party contends that the discount percentage provided for in subdivision (1) above is inappropriate, it may request the Commission to calculate the discount based specifically on the circumstances of the competing local provider. If the discount percentage fixed by the Commission is different from the percentage previously being paid by the reseller in the contested proceeding, a true-up shall be performed.
- (l) In every development where a local service provider has entered into a preferred provider contract containing provisions that are void under subsections (b), (c) or (d) of this rule, the local service provider shall, within 21 days after the effective date of this rule, mail to each of the parties to the preferred provider contract a letter advising such party that certain portions of the contract have been determined to be void. The following materials shall be attached to the letter: a copy of the preferred provider contract, with the void provisions conspicuously marked; a copy of this rule; and a copy of the Commission's order adopting this rule.
- (NCUC Docket No. P-100. Sub 152, 01/12/06)

165:55-17-30. Customer choice

- OK
- (a) Where choices are available, every customer shall have the right to choose his or her telecommunications service provider.
 - (b) A telecommunications service provider shall not enter into a contract with the owner or manager of multi-tenant dwellings to exclusively provide telecommunication services to the exclusion of other telecommunications service providers.

[Source: Reserved at 13 Ok Reg 2437, eff 7-1-96; Added at 20 Ok Reg 2301, eff 7-15-03]

Code of Laws of South Carolina 1976 Annotated Currentness

Title 58. Public Utilities, Services and Carriers

Chapter 9. Telephone, Telegraph and Express Companies

→ Article 3. Telephone Companies - Duties, Restrictions and Rights Generally

§ 58-9-200. Definitions.

As used in Sections 58-9-295 and 58-9-297:

(1) "Communications service provider" means:

- (a) a telephone utility as defined in Section 58-9-10(6);
- (b) a government-owned telecommunications service provider as defined in Section 58-9-2610(1);
- (c) a telephone cooperative as defined in Section 33-46-20(4);
- (d) a person or entity providing telephone, voice over internet protocol, similar voice service, or any other voice replacement service, data service, video service, or any information service; or
- (e) an entity using or allowing another entity to use its cable, wires, fiber, or any material, facilities, or equipment that have the ability to carry voice, data, video, or any other information transmissions.

"Communications service provider" does not mean a radio common carrier as defined in Section 58-11-10(f).

(2) "Communications service" means:

- (a) telephone service, including without limitation basic local exchange telephone service as defined in Section 58-9-10(9);
- (b) voice over internet protocol, or similar voice or voice replacement service;
- (c) data service;
- (d) video service; or
- (e) any information service.

Prohibited agreements; civil penalties

§ 58-9-210. Rates shall be just and reasonable.

Every rate made, demanded or received by any telephone utility or by any two or more telephone utilities jointly shall be just and reasonable.

§ 58-9-220. Repealed by 1983 Act No. 138 § 21, eff June 15, 1983.

§ 58-9-230. Schedules shall be adhered to.

(A) No telephone utility may directly or indirectly, by any device whatsoever or in any way, charge, demand, collect, or receive from any person or corporation a greater or less compensation for any service rendered or supplied, or to be rendered or supplied, by the telephone utility, than that prescribed in the schedules of the telephone utility applicable thereto then filed in the manner provided in Articles 1 through 13 of this chapter, nor may any person or corporation receive or accept any service from a telephone utility for a compensation greater or less than that prescribed in the schedules.

(B) Local exchange company centrex-type services or billing and collection services, or both, may be offered to subscribers without the schedules related thereto being filed as provided in subsection (A), if the Commission, after hearing, first determines that such services are subject to competition in the relevant product and geographic markets. The Commission shall retain regulatory authority, however, over the rates, revenues, investments, expenses, and quality of the services so offered.

(C) The charges for services offered by the utility pursuant to subsection (B) must, in every instance, be provided at a level above the cost of the service as determined by the commission. The regulatory staff shall have access to such data to ensure compliance with this section. The cost data is not subject to disclosure to the public. However, upon the application of any interested party and for good cause shown, the commission may enter an appropriate order which directs the manner in which the proprietary cost data provided to the regulatory staff may be made available to such interested party.

(D) When a local exchange company proposes to offer a service pursuant to subsections (B) and (C), the Commission shall first determine:

- (1) whether monopoly elements are offered as part of the centrex-type service; and
- (2) if the Commission finds the existence of a monopoly element, then it must decide whether or not that monopoly element should be unbundled from the detariffed service. If they find that the monopoly element should be unbundled, then only the competitive elements of that service may be detariffed.
- (3) This section does not amend or repeal the provisions of Section 58-9- 250.

§ 58-9-240. Permitted free or reduced rates.

Nothing herein contained shall prevent any telephone utility from granting free or reduced rate service to its officers, agents, employees, attorneys, physicians or surgeons, nor to prevent any telephone utility from granting free or reduced rate service to the State of South Carolina or any municipality therein or department thereof or to charitable and eleemosynary institutions and persons engaged in charitable and eleemosynary work, nor to prevent any telephone utility from granting free or reduced rate service with the object and for the purpose of providing relief in times and cases of flood, general epidemic, pestilence or other calamitous visitation, nor any such other instance when the Commission may deem that such service is not contrary to the public interest; *provided*, that such free or reduced rate service shall be granted in accordance with tariffs filed by such telephone utility with the Commission and which shall be subject to regulation and revision by the Commission in the same manner as other rates of telephone utilities. The terms "*officers*" and "*employees*" as used in this section shall include furloughed, pensioned and superannuated officers and employees of any such utility.

§ 58-9-250. Unreasonable preferences and differences in rates or service shall not be made; reasonable classifications may be established.

No telephone utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or corporation or subject any person or corporation to any unreasonable prejudice or disadvantage. No telephone utility shall establish or maintain any unreasonable difference as to rates or service, either as between localities or as between classes of service. Subject to the approval of the Commission, however, telephone utilities

may establish classifications of rates and services and such classifications may take into account the conditions and circumstances surrounding the service, such as the time when used, the purpose for which used, the demand upon plant facilities, the value of the service rendered or any other reasonable consideration. The Commission may determine any question arising under this section.

§ 58-9-260. Facilities and equipment shall be maintained in adequate manner.

Every telephone utility shall provide and maintain facilities and equipment to furnish reasonably adequate and efficient telephone service to its customers in this State.

§ 58-9-270. Extensions of existing facilities.

When ordered by the commission after notice to other interested telephone utilities and the public and due hearing any telephone utility may be required to establish, construct, maintain, and operate any reasonable extension of its existing facilities. If any such extension, however, by any telephone utility of its existing facilities will interfere with the service or system of any other telephone utility, the commission may on petition and after hearing either order the discontinuance of such extension or prescribe such terms and conditions with respect thereto as may be just and reasonable.

§ 58-9-280. Certificate of public convenience and necessity shall be obtained prior to construction, operation or extension of plant or system; exceptions.

(A) No telephone utility shall begin the construction or operation of any telephone utility plant or system, or of any extension thereof, except those ordered by the commission under the provisions of Section 58-9-270, without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction or operation. But this section shall not be construed to require any telephone utility to secure a certificate for any extension within any municipality or district within which it had lawfully commenced operations on June 16, 1950, or for an extension within or to territory already served by it, necessary in the ordinary course of its business, or for an extension into territory contiguous to that already occupied by it as defined by the commission and not receiving similar service from another telephone utility; but, if any telephone utility in constructing or extending its lines, plant, or system unreasonably interferes or is about to interfere unreasonably with the service or system of any other telephone utility, the commission may make such order and prescribe such terms and conditions in harmony with Articles 1 through 13 of this chapter as are just and reasonable.

(B) After notice and an opportunity to be heard, the commission may grant a certificate to operate as a telephone utility, as defined in Section 58-9-10(6), to applicants proposing to furnish local telephone service in the service territory of an incumbent LEC, subject to the conditions and exemptions stated in this section and in applicable federal law. The provisions of this act shall apply to any such application for a certificate pending before the commission on the effective date of this act; provided, however, that any carrier filing an application to furnish telecommunications service as a private line or special access service provider or as a carrier's carrier prior to March 25, 1996, may elect to comply with the certification requirements in effect on that date rather than those contained within this subsection (B); provided, further, however, that such carrier shall comply with subsection (B)(4) hereof. In determining whether to grant a certificate under this subsection, the commission may require, not inconsistent with the federal Telecommunications Act of 1996, that the:

- (1) applicant show that it possesses technical, financial, and managerial resources sufficient to provide the services requested;
- (2) service to be provided will meet the service standards that the commission may adopt;
- (3) provision of the service will not adversely impact the availability of affordable local exchange service;

(4) applicant, to the extent it may be required to do so by the commission, will participate in the support of universally available telephone service at affordable rates; and

(5) provision of the service does not otherwise adversely impact the public interest.

In its application for certification, the applicant seeking to provide the service shall set forth with particularity the proposed geographic territory to be served, and a price list and informational tariff regarding the types of local exchange and exchange access services to be provided. Any person granted authority under this section shall maintain a current price list with the commission and the Office of Regulatory Staff. A commission order, denying or approving an application for certification of a new local telephone service provider, shall be entered no more than sixty days from the filing of the application, except that the commission, upon notice, may extend that period not to exceed an additional sixty days.

(C) The commission shall determine the requirements applicable to all local telephone service providers necessary to implement this subsection. These requirements shall be consistent with applicable federal law and shall:

(1) provide for the reasonable interconnection of facilities between all certificated local telephone service providers upon a bona fide request for interconnection, subject to the negotiation process set forth in subsection (D) of this section;

(2) provide for the transfer of telephone numbers between local telephone service providers in a manner that is technically feasible;

(3) provide for the reasonable unbundling of network elements upon a request from a LEC where technically feasible and priced in a manner that recovers the providing LEC's cost;

(4) determine, for small LEC's, when and under what circumstances resale of local exchange telephone services is in the public interest and should be allowed. Telecommunications services that are available at retail to a specific category of subscribers only shall not be offered for resale to a different category of subscribers; and

(5) provide for the continued development and encouragement of universally available basic local exchange telephone service at reasonably affordable rates.

The final commission order implementing these requirements shall be issued within six months of the effective date of this section, except that the commission, upon notice, may extend that period up to an additional ninety days.

(D) A LEC shall negotiate the rates, terms, and conditions for local interconnection. In the event that the parties are unable to agree on appropriate rates, terms, and conditions for interconnection within one hundred thirty-five to one hundred sixty days of receipt of a bona fide request, either party may petition the commission for determination of the appropriate rates, terms, and conditions for interconnection. This period may be shortened or extended by mutual agreement of the parties. The commission shall determine the appropriate rates, terms, and conditions for interconnection within nine months from the filing of the petition in accordance with the terms of applicable federal law. The regulatory staff shall represent the public interest in any matter undertaken pursuant to this subsection unless the Executive Director of the Office of Regulatory Staff chooses to opt out as a participant pursuant to Section 58-4-50.

(E) In continuing South Carolina's commitment to universally available basic local exchange telephone service at affordable rates and to assist with the alignment of prices and/or cost recovery with costs, and consistent with applicable federal policies, the commission shall establish a universal service fund (USF) for distribution to a carrier(s) of last resort. The commission shall issue its final order adopting such guidelines as may be necessary for the funding and management of the USF within twelve months of the effective date of this section except that the commission, upon notice, may extend that period up to an additional ninety days. These guidelines must not be inconsistent with applicable federal law and shall address, without limitation, the following:

(1) The USF shall be administered by the Office of Regulatory Staff or a third party designated by the Office of

Regulatory Staff under guidelines to be adopted by the commission.

(2) The commission shall require all telecommunications companies providing telecommunications services within South Carolina to contribute to the USF as determined by the commission.

(3) The commission also shall require any company providing telecommunications service to contribute to the USF if, after notice and opportunity for hearing, the commission determines that the company is providing private local exchange services or radio-based local exchange services in this State that compete with a local telecommunications service provided in this State.

(4) The size of the USF shall be determined by the commission and shall be the sum of the difference, for each carrier of last resort, between its costs of providing basic local exchange services and the maximum amount it may charge for the services. The commission may use estimates to establish the size of the USF on an annual basis, provided it establishes a mechanism for adjusting any inaccuracies in the estimates.

(5) Monies in the USF shall be distributed to a carrier of last resort upon application and demonstration of the amount of the difference between its cost of providing basic local exchange services and the maximum amount it may charge for such services.

(6) The commission shall require any carrier of last resort seeking reimbursement from the fund to file with the commission and provide to the Office of Regulatory Staff the information necessary to determine the costs of providing basic local exchange telephone services. In the event that a carrier of last resort does not currently conduct detailed cost studies relating to such services, the commission shall allow for an appropriate surrogate for such study.

(7) The commission shall have the authority to make adjustments to the contribution or distribution levels based on yearly reconciliations and to order further contributions or distributions as needed.

(8) After notice and an opportunity for hearing to all affected carriers and the Office of Regulatory Staff, the commission by rule may expand the set of services within the definition of universal service based on a finding that the uniform statewide demand for such additional service is such that including the service within the definition of universal service will further the public interest; provided, however, that before implementing any such finding, the commission shall provide for recovery of unrecovered costs through the USF of such additional service by the affected carrier of last resort.

(9) Nothing in subsection (G) of this section shall preclude the commission from assessing broadband service revenues for purposes of contributions to the USF, pursuant to this subsection.

(F) Nothing in this chapter shall be interpreted to limit or restrict any right that any local exchange carrier may have under federal law.

(G)(1) Competition exists for a particular service if, for an identifiable class or group of customers in an exchange, group of exchanges, or other clearly defined geographical area, the service, its functional equivalent, or a substitute service is available from two or more providers. The commission must not:

(a) impose any requirements related to the terms, conditions, rates, or availability of broadband service; or

(b) otherwise regulate broadband service; however, in order to facilitate the continued deployment of broadband service by rural telephone companies as defined in 47 U.S.C. Section 153 (37), facilities utilized by rural telephone companies for the provision of broadband service must continue to be treated by the commission in the same manner as they were treated as of January 1, 2003, so as not to impact the provision or pricing of regulated telecommunications services by rural telephone companies. The commission shall not regulate a service for which competition exists if the market for that service is sufficiently competitive to protect the public interest. If the commission finds that competition exists for a particular service, but that service is not sufficiently competitive to protect the public interest, the commission must provide appropriate regulatory and pricing flexibility to all providers of the service.

(2) Nothing in subsection (G)(1) of this section is intended to affect the Public Service Commission's jurisdiction with respect to any service other than broadband service or to affect the application of access rates and charges to broadband providers or with respect to broadband services. Nothing in subsection (G)(1) of this section shall be construed to relieve an incumbent local exchange carrier, as defined by Section 251(h) of the federal Telecommunications Act of 1996, of its obligations pursuant to Sections 251 and 252 of the federal act or any Federal Communications Commission regulation relating to Sections 251 and 252 of the federal act to provide new entrant LEC's with unbundled access to network elements or interconnection including, but not limited to, loops, subloops, transmission facilities, and collocation space.

(3) The Office of Regulatory Staff must compile information in order to monitor the status of local telephone competition in this State. In compiling this information, the Office of Regulatory Staff must require all local exchange carriers, as defined in Section 58-9-10(12), to report to the Office of Regulatory Staff annually, the total number of access lines providing local exchange telecommunications services to an end user in this State. The Office of Regulatory Staff must also maintain a copy of all written complaints received regarding the impact broadband services may be having on the competitive local exchange market. This information must be compiled and made available prior to May fifteenth of each year.

(H) Any local exchange carrier, upon a showing of changed circumstances or that it is necessary or appropriate to realign rates with the costs of various telecommunications components, may petition the commission to reexamine any rates that have been capped pursuant to the provisions of this chapter and to set new price caps. A copy of the petition must be served upon the Office of Regulatory Staff.

(I) The incumbent LEC's subject to this section shall be authorized to meet the offerings of any local exchange carrier serving the same area by packaging services together, using volume discounts and term discounts, and by offering individual contracts for services, except as restricted by federal law. Individual contracts for services or contracts with other providers of telecommunications services shall not be filed with the commission, except as required by federal law, provided that telecommunications carriers shall provide access to such contracts to the commission as required.

(J) Subject to the requirements of applicable federal law, a small LEC may define the term "cost", as used within this section and where applicable to a small LEC, to include all embedded costs as well as a reasonable contribution to universal local service, where applicable, until such time as these costs are recovered from other sources.

(K) Subject to federal law, if the commission finds that the resale of any service or unbundled capability, element, feature, or function in a small LEC area is in the public interest, then the small LEC shall not be required to offer its services at a price below its cost.

(L) Upon enactment of this section and the establishment of the Interim LEC Fund, as specified in subsection (M) of this section, the commission shall, subject to the requirements of federal law, require any electing incumbent LEC, other than an incumbent LEC operating under an alternative regulation plan approved by the commission before the effective date of this section, to immediately set its toll switched access rates at levels comparable to the toll switched access rate levels of the largest LEC operating within the State. To offset the adverse effect on the revenues of the incumbent LEC, the commission shall allow adjustment of other rates not to exceed statewide average rates, weighted by the number of access lines, and shall allow distributions from the Interim LEC Fund, as may be necessary to recover those revenues lost through the concurrent reduction of the intrastate switched access rates.

(M) The commission shall, not later than December 31, 1996, establish an Interim LEC Fund to be administered by the Office of Regulatory Staff or a designee. The Interim LEC Fund shall initially be funded by those entities receiving an access or interconnection rate reduction from LEC's pursuant to subsection (L) in proportion to the amount of the rate reduction. To the extent that affected LEC's are entitled to payments from the USF, the Interim LEC Fund must transition into the USF as outlined in Section 58-9-280(E) when funding for the USF is finalized and adequate to support the obligations of the Interim LEC Fund.

(N) The commission shall ensure that any requirements implemented under Section 58-9-280(C) are appropriate for the service territory of the small LEC and may implement such alternative requirements necessary to protect the public interest in such service area. Specifically, the commission shall ensure for small LEC's that telecommunications services that are available at retail to a specific category of subscribers only shall not be offered for resale to a different category of subscribers. Additionally, consistent with the federal Telecommunications Act of 1996, LEC's shall not be required to offer for resale services which they do not make available on a retail basis.

(O) If any provision or section of this chapter is held invalid or held not to apply to a particular local exchange carrier, such holding shall not affect the remaining provisions of this chapter or their application to any local exchange carrier to which they might apply.

§ 58-9-285. Regulation of bundled offerings.

(A) As used in this section:

(1) "Bundled offering" means:

(a) for a qualifying LEC, an offering of two or more products or services to customers at a single price provided that:

(i) the bundled offering must be advertised and sold as a bundled offering at rates, terms, or conditions that are different than if the services are purchased separately from the LEC's tariffed offerings;

(ii) each regulated product or service in the offering is available on a stand-alone basis under a tariff on file with the commission; and

(iii) the qualifying LEC has a tariffed flat-rated local exchange service offering for residential customers and for single-line business customers on file with the commission that provides access to the services and functionalities set forth in Section 58-9-10(9).

(b) for a qualifying IXC, an offering of two or more products or services to customers at a single price provided that:

(i) the bundled offering must be advertised and sold as a bundled offering at rates, terms, or conditions that are different than if the services are purchased separately from the IXC's tariffed offerings; and

(ii) each regulated product or service in the offering is available on a stand-alone basis under a tariff on file with the commission.

(2) "Contract offering" means any contractual agreement, memorialized in writing, by which a qualifying LEC or a qualifying IXC offers any tariffed product or service to any customer at rates, terms, or conditions that differ from those set forth in the qualifying LECs or qualifying IXCs tariffs.

(3) "Qualifying IXC" means any interexchange carrier operating under alternative means of regulation authorized by the commission.

(4) "Qualifying LEC" means any LEC operating under an alternative means of regulation pursuant to Section 58-9-575; any LEC that has elected to have rates, terms, and conditions for its services determined pursuant to the plan described in Section 58-9-576(B); and any LEC that has elected to have rates, terms, and conditions determined pursuant to alternative means of regulation under Section 58-9-577.

(B) The commission must not:

(1) impose any requirements related to the terms, conditions, rates, or availability of any bundled offering or contract offering of any qualifying LEC or qualifying IXC that a customer accepts after the effective date of this act; or

(2) otherwise regulate any bundled offering or contract offering of any qualifying LEC or qualifying IXC that a customer accepts after the effective date of this act. Without limiting the foregoing, upon the filing of a complaint by an end use purchaser of a bundled offering or a contract offering, the commission may enforce the terms and conditions of a bundled offering or a contract offering under the same principles that apply when a court of general jurisdiction enforces the terms and conditions of an unregulated contract between two parties. No person or entity other than the end user purchaser that filed the complaint and the qualifying LEC or qualifying IXC that provides the bundled offering or contract offering that is the subject of such complaint shall be a party to any such complaint proceeding before the commission.

(C) A qualifying LEC or qualifying IXC providing bundled offerings or contract offerings is obligated to provide contributions to the Universal Service Fund (USF), and the commission shall ensure that contributions to the state USF, pursuant to Section 58-9-280(E), are maintained at appropriate levels. Nothing in this section affects the commission's jurisdiction over distributions from the USF pursuant to Section 58-9-280(E).

(D) Access minutes of use must continue to be classified and reported for purposes of administering the Interim LEC Fund, pursuant to Section 58-9-280(M), in the same manner as they were classified and reported before the effective date of this subsection.

(E) Nothing in this section affects any jurisdiction conferred upon the commission by 47 U.S.C. Section 254(k).

(F) Nothing in this section affects the commission's jurisdiction over complaints alleging that a change in a subscriber's selection of a provider of telecommunications service was made without appropriate authorization or that services that the customer did not order appear on the customer's bill.

(G) The State Regulation of Public Utilities Review Committee may request the Office of Regulatory Staff to compile information to enable the review committee to monitor the effect of bundled offerings and contract offerings on the provision of telecommunications services in South Carolina.

Election as to regulation of a local exchange carrier

§ 58-9-290. Interchange of service.

Telephone utilities may contract with each other for the connection of their respective lines or systems and for the interchange through such connections of public telephone and communications service and for other proper purposes. A copy of every such contract shall be filed with the commission and provided to the Office of Regulatory Staff. Such contract shall remain in effect in accordance with its terms unless the commission, after notice and hearing, shall find that such contract is contrary to the public interest and shall disapprove it.

§ 58-9-295. Agreements limiting other communications providers from access to rights-of-way prohibited; penalties.

(A) No communications service provider or a parent company, subsidiary, or affiliate of a communications service provider shall enter into any contract, agreement, or arrangement, oral or written, with a person or entity that:

(1) requires a person or entity to restrict or limit the ability of any other communications service provider from obtaining easements or rights-of-way for the installation of facilities or equipment to provide communications services in this State or otherwise deny or restrict access to the real property by any other communications service provider; or

(2) offers or grants incentives or rewards to an owner of real property or the owner's agent that are contingent

upon restricting or limiting the ability of any other communications service provider from obtaining easements or rights-of-way for the installation of facilities or equipment to provide communications services in this State or otherwise denying or restricting access to the real property by any other communications service provider.

(B)(1) Nothing in this section prohibits a communications service provider and a user or prospective user of communications service from entering into an agreement with respect to the user or prospective user's own communications service.

(2) Nothing in this section prohibits an owner of real property or the owner's agent from entering into agreements with one or more communications service providers for the purpose of marketing a communications service to the owner of real property or to the tenants of real property, so long as such agreements are not in violation of subsection (A).

(3) This section does not affect a franchise agreement or other agreement with a municipality concerning the use of public streets, public rights-of-way, or other public property.

(C) All contracts, agreements, or arrangements in violation of subsection (A) made on or after the effective date of this section are void and unenforceable.

(D) A communications service provider who violates the provisions of this section is subject to a monetary penalty as provided in Section 58-9-1610. Each day that a contract, agreement, or arrangement prohibited by this section remains in force or effect shall constitute a separate violation as provided in Section 58-9-1620.

§ 58-9-297. Relief from obligation to provide communications services.

(A) No other communications service provider, including without limitation a carrier of last resort as defined in Section 58-9-10(10), shall be obligated to provide any communications service to the occupants of the property described herein if an owner or developer of any multi-tenant business or residential property, including without limitation apartments, condominiums, subdivisions, office buildings, or office parks:

(1) permits only one communications service provider to install its facilities or equipment during the construction phase of the property;

(2) accepts or agrees to accept incentives or rewards from a communications service provider to the owner, developer, or occupants of the property that are contingent upon the provision of communications service by that communications service provider to the exclusion of other providers of communications service;

(3) collects from the occupants of the property charges for the provision of communications service to the occupants in any manner, including without limitation through rent, fees, or dues; or

(4) enters into an agreement with a communications service provider that is in violation of Section 58-9-295.

(B) If any communications service provider is relieved of an obligation to provide communications service to occupants of property pursuant to subsection (A), the communications service provider may voluntarily provide communications services to the occupants of that property, and the public service commission must not impose any requirements related to the terms, conditions, rates, or availability of this service.

§ 58-9-300. Abandonment of service.

No telephone utility shall abandon all or any portion of its service to the public, except for ordinary discontinuance of service for nonpayment of a lawful charge or for violation of rules and regulations approved by the commission, unless written application is first made to the commission for the issuance of a certificate authorizing such abandonment, nor until the commission in its discretion issues such certificate. Any application must also be served

on the Office of Regulatory Staff at the same time it is filed with the commission.

§ 58-9-310. Sale or other disposition of property, powers, franchises or privileges.

No telephone utility, without the approval of the Commission after due hearing and compliance with all other existing requirements of the laws of the State in relation thereto, may sell, transfer, lease, consolidate, or merge its property, powers, franchises, or privileges or any of them; provided, however, that a telephone cooperative association may acquire or incorporate a subsidiary corporation or a subsidiary cooperative association without the approval of the Commission.

§ 58-9-320. Transactions with affiliates.

When in the judgment of the commission there is a reasonably substantial affiliation of any telephone utility engaged in business in this State with any other corporation or person or when in the judgment of the commission any other corporation or person either exercises, or is in position to exercise, by reason of ownership or control of securities or for any other cause, any reasonably substantial control over the business or policies of any telephone utility engaged in business in this State, the burden of proof shall be upon the telephone utility to establish as determined by the commission the reasonableness, fairness, and absence of injurious effect upon the public interest of any fees or charges growing out of any transactions between any telephone utility and such other corporation or person. Every telephone utility shall be required to produce, if so ordered by the commission, for the information of the commission, the Office of Regulatory Staff, and the public, all such contracts, papers, and documents relating thereto and explanatory thereof as may be required by the commission, and unless the reasonableness, fairness, and absence of injurious effect upon the public interest of such fees and charges are established as determined by the commission, they shall not be allowed by the commission for rate-making purposes. The commission shall not allow for rate-making purposes any fees or expenses included in any contract or agreement with an affiliate representing charges that the commission has directly disallowed in its rate-making orders.

§ 58-9-330. Participation in profits from efficiency.

For the purpose of encouraging economy, efficiency and improvements in methods of service any telephone utility may participate, subject to the approval of the Commission, to such extent as may be permitted by the Commission, in the additional profits arising from any economy, efficiency or improvement in methods or service instituted by such telephone utility.

§ 58-9-340. System of accounts.

The Office of Regulatory Staff may, in its discretion, and subject to approval of the commission, prescribe systems of accounts to be kept by telephone utilities subject to the commission's jurisdiction and the Office of Regulatory Staff may prescribe the manner in which the accounts shall be kept and may require every telephone utility to keep its books, papers, and records accurately and faithfully according to the system of accounts as prescribed by the Office of Regulatory Staff. But nothing in this section shall be construed to be in conflict with or in violation of the provisions of the Communications Act of Congress of 1934, as amended (U. S. C. A. Title 47, Sections 151 through 609), nor shall anything herein be construed to be in conflict with any lawful order of the Federal Communications Commission issued pursuant to the authority vested in it by said act of Congress.

§ 58-9-350. Depreciation and retirement charges.

Every telephone utility shall have the right, and may be so required, to charge annually as an operating expense a reasonable sum for depreciation and credit it to a reserve account for such purpose. Such reserve account shall be charged with plant retirements. But if the reserve thus created shall at any time in the judgment of the Commission be excessive, the Commission after due hearing shall make such order as will result in credits to such reserve

thereafter conforming to actual facts and conditions as ascertained by the Commission.

The Commission may control or limit such depreciation reserve.

Nothing in this section shall be construed to be in conflict with or in violation of the provisions of the Communications Act of Congress of 1934, as amended (U. S. C. A. Title 47, Sections 151 through 609), nor shall anything herein be construed to be in conflict with any lawful order of the Federal Communications Commission issued pursuant to the authority vested in it by said act of Congress.

§ 58-9-360. Restrictions on capitalization for rate-making purposes.

No telephone utility shall for rate-making purposes, capitalize its franchises, rights, powers or privileges or its right to own and operate or enjoy any such franchise, rights, powers or privileges in excess of the amount paid to the State or to any political subdivision of the State as the consideration for the grant thereof or capitalize any lease or contract of sale for consolidation or merger of two or more telephone utilities; nor shall the Commission permit any such capitalization by a telephone utility nor shall any telephone utility issue by way of substitution any capital stock, trust certificates, bonds, notes or other evidences of indebtedness or other securities for any consolidated or merged company exceeding the aggregate value of the properties so consolidated or merged and any additional sum of money actually contributed in cash and additional property or labor actually contributed. The determination of such consideration or value as aforesaid shall be subject to the approval of the Commission.

§ 58-9-370. Annual and special reports.

(A) Subject to approval of the commission, the Office of Regulatory Staff may require any telephone utility to file annual reports in such form and of such content as the Office of Regulatory Staff may require and special reports concerning any matter about which the Office of Regulatory Staff is authorized to inquire or to keep itself informed or which it is required to enforce. All reports shall be under oath when required by the Office of Regulatory Staff.

(B) A copy of all reports filed with the commission also must be provided to the Office of Regulatory Staff.

§ 58-9-380. Office in State.

Each telephone utility shall have an office in one of the counties of this State in which its property or some part thereof is located and shall keep in such office all such books, accounts, papers, and records as shall reasonably be required by the Office of Regulatory Staff to be kept within the State. No books, accounts, papers, or records required by the Office of Regulatory Staff to be kept within the State shall be removed at any time from the State except upon such conditions as may be prescribed by the Office of Regulatory Staff.

§ 58-9-390. Compliance with rules and regulations.

Each telephone utility shall obey and comply with each and every requirement of every order, decision, direction, rule, or regulation made or prescribed by the commission and every direction, rule, or regulation made or prescribed by the Office of Regulatory Staff in the performance of its duties under Articles 1 through 13 of this chapter, or in relation to any other matter in any way relating to or affecting the business of such telephone utility and shall do everything necessary or proper in order to secure compliance with and observance of every such order, decision, direction, rule, or regulation by all of its officers, agents, and employees.

Current through End of 2006 Reg. Sess.
END OF DOCUMENT

West's Tennessee Code Annotated Currentness
Title 65. Public Utilities and Carriers (Refs & Annos)

 Chapter 21. Telegraphs and Telephones

→ Part 2. Rights-of-way

§ 65-21-201. Rights of way

Any person or corporation organized for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence the equivalent thereof, which may be invented or discovered, may construct, operate, and maintain such telegraph, telephone, or other lines necessary for the speedy transmission of intelligence, along and over the public highways and streets of cities and towns, or across and under the waters, and over any lands or public works belonging to this state, and on and over the lands of private individuals, and upon, along, and parallel to any of the railroads, and on and over the bridges, trestles, or structures of such railroads.

§ 65-21-202. Public way obstruction

The ordinary use of such public highways, streets, works, railroads, bridges, trestles, or structures shall not be thereby obstructed, nor the navigation of such waters impeded, and just damages shall be paid to the owners of such lands, railroads, and turnpikes, by reason of the occupation of the lands, railroads, and turnpikes by the telegraph or telephone corporations.

§ 65-21-203. Exclusive rights

No telegraph or telephone corporation has the power to contract with the owners of lands or the rights in lands, or with any other person or corporation, for the right to erect, operate, or maintain telegraph, telephone, or other lines or works for the speedy transmission of intelligence, over the lands, privileges, rights, or easements of such owner or other person or corporation, to the exclusion of other persons or corporations authorized to erect and operate lines and works for the speedy transmission of intelligence.

§ 65-21-204. Condemnation

In the event such telegraph or telephone companies should fail, upon application to such individuals, railroads, companies, to secure such right-of-way, by consent, contract, or agreement, then such telegraph or telephone corporations shall have the right to proceed to procure the condemnation of such property, lands, rights, privileges, and easements, in the manner prescribed by law for taking private property for works of internal improvement.

§ 65-21-205. Line construction; liability

When any such telegraph or telephone company shall desire to construct lines on or along the lands of individuals, or on the right-of-way and structures of any railroad, the telegraph or telephone company may, by its agents, have the right peacefully to enter upon such lands, structures, or right-of-way, and survey, locate, and lay out its lines thereon, being liable, however, for any damage that may result by reason of such act.

Current through end of 2006 Second Reg. Sess.
END OF DOCUMENT

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.

Subchapter F. REGULATION OF TELECOMMUNICATIONS SERVICES.

§26.129. Standards for Access to Provide Telecommunications Services at Tenant Request.

- (a) **Purpose.** The purpose of this section is to implement Public Utility Regulatory Act (PURA) §§54.259, 54.260, and 54.261 regarding the non-discriminatory treatment of a telecommunications utility by the property owner upon a tenant's request for telecommunications services.
- (b) **Application.**
- (1) This section applies to the following entities:
 - (A) "Telecommunications utilities" or "telecommunications utility" as defined in PURA §51.002(11), that hold a consent, franchise, or permit as determined to be the appropriate grants of authority by the municipality and hold a certificate if required by PURA;
 - (B) Public or private property owners of commercial property and the property owner's authorized representative(s); and
 - (C) Public or private property owners of commercially operated residential property with four or more dwelling units and the property owner's authorized representative(s).
 - (2) This section does not apply to institutions of higher education as set forth by PURA §54.259(b).
- (c) **Definitions.** The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.
- (1) **Conduit** – A pipe installed on the property, in a building between floors, attached to walls, between buildings, located in the ceiling or floor space of a building, located on a customer's premise, or from a public right of way into a property for the purposes of containing and protecting cable.
 - (2) **Property** – A building or buildings that are under common ownership and which are located on a single tract of land or tracts of land that are adjoining or would be in the absence of streets or other public rights-of-ways.
 - (3) **Property owner** – The owner of the property or its authorized representative(s).
 - (4) **Requesting carrier** – A telecommunications utility seeking access to space on the property for the purpose of providing telecommunications services to one or more tenants who have requested such services.
 - (5) **Space** – Area of the property for which access is being requested by the requesting carrier, which will be used to install the telecommunications equipment needed to provide telecommunications services to a requesting tenant on the property. Space includes conduit and may be located in or on the rooftop of a building or buildings on the property.
 - (6) **Telecommunications equipment** – The equipment installed or used by the requesting carrier to provide telecommunications services to a requesting tenant.
 - (7) **Tenant** – Any occupant of a building or buildings on the property under the terms of a lease with the property owner which has a remaining term of more than six months and who is not subject to filed bona fide eviction proceedings under such lease with the property owner, or an authorized subtenant of such occupant whose occupancy is subject to the terms of the primary lease which has a remaining term of more than six months.
- (d) **Rights of parties.**
- (1) **Tenant's right to choose requesting carrier.** A tenant is entitled to choose the provider of its telecommunications services.
 - (2) **Property owner's rights to manage access.** The requirements of this subsection are not intended to eliminate or restrict the property owner's rights to manage access to public or private property pursuant to PURA §§54.259, 54.260, and 54.261.

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.

Subchapter F. REGULATION OF TELECOMMUNICATIONS SERVICES.

§26.129(d)(2) continued

- (A) A property owner may:
 - (i) impose a condition on the requesting carrier that is reasonably necessary to protect:
 - (I) the safety, security, appearance, and condition of the property; and
 - (II) the safety and convenience of other persons;
 - (ii) impose a reasonable limitation on the time at which the requesting carrier may have access to the property to install telecommunications equipment;
 - (iii) impose a reasonable limitation on the number of such requesting carriers that have access to the property, if the property owner can demonstrate a space constraint that requires the limitation;
 - (iv) require a requesting carrier to agree to indemnify the property owner for damage caused installing, operating, or removing telecommunications equipment;
 - (v) require a tenant or requesting carrier to bear the entire cost of installing, operating, or removing telecommunications equipment; and
 - (vi) require requesting carrier to pay compensation that is reasonable and nondiscriminatory among such telecommunications utilities.
- (B) A property owner may not:
 - (i) prevent the requesting carrier from installing telecommunications equipment on the property upon a tenant request;
 - (ii) interfere with the requesting carrier's installation of telecommunications equipment on the property upon a tenant request;
 - (iii) discriminate against such requesting carrier regarding installation, terms, or compensation of telecommunications equipment to a tenant on the property;
 - (iv) demand or accept an unreasonable payment of any kind from a tenant or the requesting carrier for allowing the requesting carrier on or in the property; or
 - (v) discriminate in favor of or against a tenant in any manner, including rental charge discrimination, based on the identity of a telecommunications utility from which a tenant receives telecommunications services.
- (3) **Requesting carrier's right to access.**
 - (A) Upon a tenant request, the requesting carrier has the right to install telecommunications equipment on the property in order to provide telecommunications services to the requesting tenant:
 - (i) for a period no longer than the remaining term of the requesting tenant's lease unless otherwise agreed to by the requesting carrier and the property owner. Should the requesting tenant's lease renew, the agreement between the requesting carrier and the property owner automatically continues, without the need for renegotiation, for the term of the requesting tenant's renewal;
 - (ii) without interference from the property owner, except as provided in this subsection; and
 - (iii) at terms, conditions, and compensation rates which are non-discriminatory.
 - (B) The requesting carrier shall comply with all applicable federal, state, and local codes and standards, *e.g.*, fire codes, electrical codes, safety codes, building codes, elevator codes.
- (4) **Restriction on exclusive agreement.** A telecommunications utility shall not enter into an agreement, contract, pact, understanding or other like arrangement with the property owner to be the sole or exclusive provider of telecommunications services to actual or prospective tenants on the property.

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.

Subchapter F. REGULATION OF TELECOMMUNICATIONS SERVICES.

(e) Procedures upon tenant request.

(1) Tour of property.

- (A) Upon receiving a request for telecommunications services from a tenant, but prior to or concurrently with providing the property owner with notice of intent to install telecommunications equipment as described in paragraph (3) of this subsection, the requesting carrier may request, in writing, a tour of the property to determine an appropriate location for the telecommunications equipment needed to provide the telecommunications services requested by such tenant. This request shall identify the requesting tenant and be sent by certified mail, return receipt requested to the property's on-site manager, or designee, and to the person identified in the tenant's lease to receive notices.
- (B) The property owner shall provide such property tour within ten business days of receipt of the requesting carrier's written request.
- (C) The requesting carrier and the property owner may agree, in writing, to extend the timelines prescribed by this subsection.

(2) Request for technical drawings.

- (A) In its written request for a tour of the property, the requesting carrier may request that the property owner provide computer aided design (CAD) drawings or similarly detailed drawings of the mechanical room(s), risers and other common spaces, if available, in order to assist the requesting carrier in developing plans and specifications for placement of telecommunications equipment.
- (B) Such drawings should be provided to the requesting carrier, within ten business days of the property owner's receipt of the requesting carrier's written request. The requesting carrier will bear the reasonable actual cost of providing the requested drawings.
- (C) The requesting carrier and the property owner may agree, in writing, to extend the timelines prescribed by this subsection.

(3) Notice of intent to install telecommunications equipment.

- (A) Upon receiving a request for telecommunications services from a tenant, the requesting carrier shall notify the property owner not fewer than 30 calendar days before the proposed date on which installation of telecommunications equipment needed to provide the telecommunications services requested by a tenant is to commence.
- (B) Such notice shall be sent by certified mail, return receipt requested, to the property's on-site manager, or designee, and to the person identified in the tenant's lease to receive notices.
- (C) The requesting carrier shall include, but is not limited to, the following in its notice of intent:
 - (i) the identity of the requesting tenant;
 - (ii) the property address and building number (if applicable);
 - (iii) the proposed timeline for the installation of telecommunications equipment;
 - (iv) the type of telecommunications equipment to be installed;
 - (v) the proposed location, space requirements, proposed engineering drawings, and other specifications of the telecommunications equipment;
 - (vi) the conduit requirements, if any; and
 - (vii) a copy of PURA §§54.259, 54.260, and 54.261 and this section (Substantive Rule §26.129).
- (D) The requesting carrier and the property owner may agree, in writing, to extend the timelines prescribed by this subsection.

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.

Subchapter F. REGULATION OF TELECOMMUNICATIONS SERVICES.

(f) **Requirement to negotiate for 30 days.**

- (1) Upon receipt of the requesting carrier's notice of intent to install telecommunications equipment, the property owner and the requesting carrier shall attempt to reach a mutually acceptable agreement regarding the installation of the requesting carrier's telecommunications equipment and reasonable compensation due the property owner as a result of such installation.
- (2) If such an agreement is not reached within 30 calendar days of the property owner's receipt of the requesting carrier's notice of intent, either party may file for resolution pursuant to subsection (i) of this section.
- (3) The requesting carrier and the property owner may agree, in writing, to extend the period of negotiation prescribed by this subsection.

(g) **Parameters for installation of telecommunications equipment.** The property owner shall not deny the requesting carrier access to space, except due to inadequate space or safety concerns.

(1) **Inadequate space.**

- (A) Property owner's denial due to inadequate space. The property owner may deny access to space if it does so within ten business days of its receipt of the requesting carrier's notice of intent to install telecommunications equipment, where the space and/or conduit required for installation is not sufficient to accommodate the requesting carrier's request.
- (B) Demonstration of inadequate space.
 - (i) In the event the property owner denies access to space, the property owner shall demonstrate that there is insufficient space and/or conduit to accommodate the requesting carrier's request for space. The property owner shall allow the requesting carrier to inspect the space and/or conduit to which it is denied access; or it may utilize any other method of proof mutually agreed upon by the property owner and the requesting carrier.
 - (ii) Such demonstration shall be completed within ten business days of the requesting carrier's receipt of the property owner's denial.
 - (iii) Following such demonstration or other agreed upon method of proof, the requesting carrier shall have ten business days to dispute the property owner's assertion that a space limitation exists by pursuing resolution pursuant to subsection (i) of this section.
- (C) The requesting carrier and the property owner may agree, in writing, to extend the timelines prescribed by this subsection.

(2) **Safety concerns.**

- (A) Property owner's denial due to safety concern. The property owner may deny access to space if it does so within ten business days of its receipt of the requesting carrier's notice of intent to install telecommunications equipment, where the installation of the requesting carrier's telecommunications equipment would cause an unreasonable circumstance that would compromise the safety of the property and/or persons on the property.
- (B) Demonstration of safety concern.
 - (i) In the event the property owner denies access to space, the property owner shall demonstrate that an unreasonable safety hazard that requires the denial of access to space exists. The property owner shall specify the alleged safety hazard and cite any applicable codes and/or standards. The property owner shall allow the requesting carrier to inspect the space and/or conduit to which it is denied access, or it may utilize any other method of proof mutually agreed upon by the property owner and the requesting carrier.
 - (ii) Such demonstration shall be completed within ten business days of the requesting carrier's receipt of the property owner's denial.

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.

Subchapter F. REGULATION OF TELECOMMUNICATIONS SERVICES.

§26.129(g)(2)(B) continued

- (iii) Following such demonstration or other agreed upon method of proof, the requesting carrier shall have ten business days to dispute the property owner's assertion that a safety hazard exists by pursuing resolution pursuant to subsection (i) of this section.
 - (C) The requesting carrier and the property owner may agree, in writing, to extend the timelines prescribed by this subsection.
- (h) **Parameters for determining reasonable compensation for access.**
 - (1) The property owner and the requesting carrier shall attempt to reach a mutually acceptable agreement regarding reasonable and non-discriminatory compensation due the property owner as a result of the requesting carrier's installation of telecommunications equipment required to provide telecommunications services to a requesting tenant.
 - (2) The property owner shall not impose a fee on the requesting carrier unrelated to the requesting carrier's usage of space and/or provision of telecommunications services to a requesting tenant, except as provided by agreement of the property owner and the requesting carrier.
 - (3) The property owner and the requesting carrier shall negotiate terms and conditions concerning the removal of the requesting carrier's telecommunications equipment upon the departure of a tenant served by such requesting carrier or the end of the service agreement between a tenant and the requesting carrier.
 - (4) The property owner may require a security deposit not to exceed an amount equal to one month of fees or rents as determined by the agreement between the requesting carrier and the property owner. The requesting carrier and property owner may agree, in writing, to a security deposit of a differing amount than prescribed by this subsection.
- (i) **Failure to reach negotiated agreement.**
 - (1) **Alternative Dispute Resolution.** As an alternative to petitioning the commission for resolution of a dispute, upon agreement of both parties, parties may voluntarily submit any controversy or claim under this section to settlement by alternative dispute resolution. This alternative dispute resolution shall be conducted under the alternative dispute resolution procedures of the Texas Government Code, Administrative Procedure Act, Chapter 2009, and the Texas Civil Practice and Remedies Code, Chapter 154.
 - (2) **Petition to commission for resolution of dispute.** If a mutually acceptable agreement regarding the installation of the requesting carrier's telecommunications equipment, the reasonable compensation due the property owner as a result of such installation, or other disputed issues is not reached within 30 calendar days of the property owner's receipt of the requesting carrier's notice of intent to install telecommunications equipment, either the property owner or the requesting carrier may petition the commission for resolution. The petition shall include proof of the requesting carrier's proper service of notice of intent to the property owner in the form of an affidavit and attached copy of return receipt.
 - (3) **Types of disputes and information required for each.**
 - (A) Installation dispute.
 - (i) The property owner may deny access consistent with subsection (g) of this section.
 - (ii) The property owner and the requesting carrier shall each provide the commission with information specifying the space or safety related installation dispute(s) that is preventing a negotiated agreement.
 - (iii) The property owner and the requesting carrier shall each provide the commission with information supporting its position in the dispute(s).

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.

Subchapter F. REGULATION OF TELECOMMUNICATIONS SERVICES.

§26.129(i)(3) continued

- (B) Reasonable compensation dispute.
 - (i) The property owner shall provide the commission with the amount of compensation being sought and the basis for such claim, including information supporting the factors listed in clause (iii) of this subparagraph.
 - (ii) The requesting carrier shall provide the commission with information supporting the amount of compensation it deems reasonable to compensate the property owner for installation of its telecommunications equipment.
 - (iii) In determining a reasonable amount of compensation due the property owner for installation of the requesting carrier's telecommunications equipment, the commission may consider, but is not limited to, the following:
 - (I) the location and amount of space occupied by installation of the requesting carrier's telecommunications equipment;
 - (II) evidence that the property owner has a specific alternative use for any space which would be occupied by the requesting carrier's telecommunications equipment and which would result in a specific quantifiable loss to the property owner;
 - (III) the value of the property before and after the installation of the requesting carrier's telecommunications equipment and the methods used to determine such values;
 - (IV) possible interference of the requesting carrier's telecommunications equipment with the use and occupancy of the property which would cause a decrease in the rental or resale value of the property;
 - (V) actual costs incurred by the property owner directly related to installation of the requesting carrier's telecommunications equipment;
 - (VI) the market rate for similar space used for installation of telecommunications equipment in a similar property; and
 - (VII) the market rate for tenant leaseable space in the property or a similar property.
- (C) Other disputed issues.
 - (i) The property owner and the requesting carrier shall each provide the commission with information specifying any other dispute(s) preventing a negotiated agreement.
 - (ii) The property owner and the requesting carrier shall each provide the commission with information supporting its position regarding these other dispute(s).
- (4) **Procedure.**
 - (A) Upon the proper filing of a petition, as set forth in paragraph (1) of this subsection, the commission may proceed to resolution of a dispute pursuant to the commission's procedural rules as set forth in Chapter 22 of this title (relating to Practice and Procedure).
 - (B) In addition to the requirements set forth in paragraph (1) of this subsection, all petitions shall comply with the requirements of Chapter 22, Subchapter D of this title (relating to Notice) and Chapter 22, Subchapter E of this title (relating to Pleadings and Other Documents).
 - (C) The commission may grant interim relief, subject to true-up, so as not to impair or delay, the right of the requesting carrier to install, maintain, and remove its telecommunications equipment, or to provide telecommunications services to a requesting tenant, during the pendency of the proceeding.

**CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS
SERVICE PROVIDERS.**

Subchapter F. REGULATION OF TELECOMMUNICATIONS SERVICES.

- (j) **Administrative penalties.** The provisions set forth in §22.246 of this title (relating to Administrative Penalties) shall apply to any violation of this section whether by a property owner, property manager, or telecommunications utility.

EXHIBIT E

MICHAEL K. JEANES, CLERK

RECEIVED CCC
NIGHT DEPOSITORY

05 JUN 30 PM 5: 36

COPY

JUN 30 2005



MICHAEL K. JEANES, CLERK
O. CARDENAS
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ACCIPITER COMMUNICATIONS, INC.,
a Nevada corporation,

Plaintiff,

v.

COX ARIZONA TELCOM, L.L.C. an
Arizona limited liability company;
COXCOM, INC., A DELAWARE
CORPORATION (FN), a Delaware
corporation; COX COMMUNICATIONS,
INC., a Delaware corporation; SHEA
SUNBELT PLEASANT POINT, L.L.C.,
a/k/a VISTANCIA L.L.C., a Delaware
limited liability company; VISTANCIA
COMMUNICATIONS, L.L.C.; an Arizona
limited liability company; CITY OF
PEORIA, an Arizona municipal corporation;
DEBRA STARK, in her official capacity as
the Director of the Community Development
Department of the City of Peoria; JOHN
DOES I-X; JANE DOES I-X; ABC
CORPORATIONS I-X; and XYZ
PARTNERSHIPS or OTHER ENTITIES I-
X;

Defendants.

Cause No. _____

CV 2005-010727

COMPLAINT

(Non-classified Civil)

Plaintiff Accipiter Communications, Inc., by and through undersigned counsel, for its
Complaint alleges as follows:

1 **I. Introduction.**

2 1. This Complaint is brought by a local telephone company Accipiter
3 Communications, Inc., ("Accipiter"), which has been unlawfully precluded from offering its
4 communications services to the public within a vast master planned community known as
5 Vistancia, which is located within Accipiter's service area. Accipiter is still investigating the
6 facts and circumstances surrounding the allegations in this Complaint, which is being filed at
7 this time to preserve its claims against the Defendants. Accipiter will promptly seek to amend
8 this Complaint should additional facts and claims become known.

9 2. The wrongful scheme to keep Accipiter from competing for customers in
10 Vistancia involves an elaborate series of carefully crafted instruments and multiple contract
11 agreements with some terms very selectively disclosed to the public and other terms cloaked
12 from public view under a claim of confidentiality. When viewed together the documents reveal
13 a conspiracy and scheme to unlawfully impose a monopoly over communications within
14 Vistancia and to intentionally defraud the Plaintiff and all other wireline communications
15 carriers, other than Cox, that may attempt to compete in Vistancia.

16 **II. Parties, Jurisdiction and Venue.**

17 3. Plaintiff, Accipiter Communications, Inc., is a Nevada corporation authorized to
18 conduct business in Arizona. Accipiter is a local exchange carrier in the business of providing
19 telephone and other wireline communications services such as cable television and high speed
20 internet service to the public. Accipiter conducts its business in Arizona including Maricopa
21 County, Arizona. Accipiter is what is commonly known as an incumbent local exchange carrier
22 or "ILEC." Accipiter was granted a Certificate of Convenience and Necessity ("CC&N") by the
23 Arizona Corporation Commission to provide local exchange telecommunications services in
24 portions of Maricopa and Yavapai Counties. Accipiter's service area includes largely rural areas
25 to the north and west of the Phoenix metropolitan area.

26 4. The development that is the subject of this litigation is called Vistancia (the

1 “Development”). Vistancia is a master planned community located within the city limits of the
2 City of Peoria, in the northwestern part of the City, at roughly the intersection of Jomax and El
3 Mirage Roads. According to the developer’s marketing literature and information from the City
4 of Peoria, the Development contains approximately 7,100 acres and at build-out will consist of
5 approximately 17,000 housing units with a population of 45,000 residents, and 820 acres
6 dedicated to commercial, mixed use and business park facilities, school sites, golf courses, parks
7 and other amenities. Based on total number of housing units, Vistancia will be approximately
8 the size of the City of Prescott Arizona, the 15th largest city in Arizona. The Development
9 opened to the public in or about February 2004. More than 1,160 homes were sold in 2004,
10 during the first ten months that the Development was open. Significantly more than 1,160
11 building permits were issued for construction of infrastructure and homes in the Development
12 during 2004, and additional building permits for construction in the Development continue to
13 be applied for and issued, and the developer intends that building permits will continue to be
14 applied for and issued on an ongoing bases over the next several years as the Development
15 continues with construction and sales to the public.

16 5. Defendant Shea Sunbelt Pleasant Point, LLC (“Shea Sunbelt”) is the master
17 developer of the Development. On information and belief, Shea Sunbelt Pleasant Point, LLC
18 is a Delaware limited liability company that is authorized to do business and is doing business
19 in Arizona. Shea Sunbelt is the sole member and manager of Defendant Vistancia
20 Communications, LLC. After some of the events that are the subject of this Complaint had
21 occurred, Shea Sunbelt Pleasant Point, LLC changed its name to Vistancia LLC. However, Shea
22 Sunbelt has continued to do business from time to time under the name of Shea Sunbelt Pleasant
23 Point LLC. Upon information and belief, Shea Sunbelt has exclusive authority to direct the
24 operations and activities of Defendant Vistancia Communications, LLC.

25 6. On information and belief, Defendant Vistancia Communications, L.L.C..
26 (“Vistancia Communications”) is an Arizona limited liability company that was formed by Shea

1 Sunbelt on or about March 6, 2003. Vistancia Communications was created for the sole purpose
2 of carrying out and otherwise facilitating the wrongful acts complained of in this Complaint.
3 Vistancia Communications is referred to as the "Access Entity" in the numerous interlocking
4 instruments and agreements that are the subject of this Complaint.

5 7. Shea Sunbelt and Vistancia Communication are referred to collectively in this
6 Complaint as the "Developer." The Developer defendants are alter egos of each other, and each
7 of the Developer defendants acted at the direction of, on behalf of, and under the control of the
8 other Developer defendant with regard to the allegations of and subject matter of this Complaint.
9 All of the Developer defendants are liable for and responsible for the actions of the other
10 Developer defendant with regard to this Complaint.

11 8. On information and belief, Cox Arizona Telcom, LLC, ("Cox Arizona Telcom")
12 is an Arizona limited liability company. Cox Arizona Telcom is a competitive local exchange
13 carrier ("CLEC") that provides telephone services to the public in competition with services
14 provided by ILECs including in competition with the Plaintiff's services. Upon information and
15 belief, Cox Arizona Telcom, LLC, is the successor-in-interest to Cox Arizona Telcom, Inc. and
16 successor in interest to Cox Arizona Telcom II, L.L.C.

17 9. On information and belief, Defendant CoxCom, Inc., A Delaware Corporation
18 (FN), ("CoxCom") is a Delaware corporation authorized to conduct business in Arizona and
19 doing business in numerous states including Arizona, and more specifically CoxCom does
20 business in Maricopa County Arizona. CoxCom is in the business of selling and delivering
21 cable television and high speed internet service and similar services to the public. Also on
22 information and belief, in addition to its own name, CoxCom from time to time also conducts
23 its business under numerous other names including but not limited to CoxCom, Cox
24 Communications Phoenix, Cox Communications, Cox Communications, Inc., Cox Business
25 Services, as well as other similar and dissimilar names. Also on information and belief,
26 CoxCom is the sole Member and Manager of Cox Arizona Telcom.

1 10. On information and belief, Defendant Cox Communications , Inc., is a Delaware
2 corporation that is not authorized to conduct business in Arizona. Cox Communications, Inc.,
3 does business nationwide, including in Maricopa County Arizona. Also on information and
4 belief, CoxCom is a wholly owned subsidiary of Cox Communications, Inc.

5 11. Defendants Cox Arizona Telcom, CoxCom, and Cox Communications, Inc. are
6 referred to collectively in this Complaint as "Cox." The Cox defendants are alter egos of each
7 other, and each of the Cox defendants acted at the direction of, on behalf of, and under the
8 control of each of the other Cox defendants with regard to the allegations of and subject matter
9 of this Complaint. All of the Cox defendants are liable for and responsible for the actions of the
10 other Cox defendant with regard to this Complaint

11 12. Defendant City of Peoria ("City") is an Arizona municipal corporation duly
12 organized under the laws of the State of Arizona, and is located within Maricopa County,
13 Arizona. The City has been named in this Complaint as a proper party needed to give effect to
14 the counts relating to the Vistancia plats and building permits.

15 13. Defendant Debra Stark (the Director) is the Community Development Department
16 Director of the City of Peoria and is named in her official capacity as the Community
17 Development Department Director of the City of Peoria. The Director has been named in this
18 Complaint as a proper party needed to give effect to the counts relating to the Vistancia plats and
19 building permits.

20 14. John Does I-X, Jane Does I-X, ABC Corporations I-X and XYZ Partnerships or
21 Other Entities I-X are individuals, corporations, partnerships and other entities not yet
22 sufficiently known to be identified at the time of filing of this Complaint. Plaintiff will seek
23 leave to amend the Complaint when the true identities of any such Defendants become known.

24 15. Each of the Defendants, separately and collectively, has caused events to occur
25 in Maricopa County, Arizona that give rise to the causes of action set forth in this Complaint.

26 16. The Cox and Developer Defendants have conspired, agreed, and otherwise

1 wrongfully created a complex web of intricate inter-related documents, agreements, contracts,
2 understandings, actions and misrepresentations that erected impenetrable barriers to entry of
3 competition in Vistancia.

4 **III. Developer Requested a Single ILEC for Vistancia.**

5 17. As things existed when Vistancia was first proposed by the Developer, Vistancia
6 stretched across the certificated areas of two different ILECs, Accipiter and Qwest. Most of
7 Vistancia was located within Accipiter's certificated area, and a smaller southern portion of the
8 Development was withing Qwest's then existing certificated area.

9 18. Commencing in early 2002, Shea Sunbelt, Accipiter and Qwest had discussions
10 regarding the provision of telecommunications services in Vistancia. In those discussions, Shea
11 Sunbelt expressed its desire that the Development be served by a single incumbent local
12 exchange carrier rather than splitting the Development between Accipiter and Qwest territories.
13 During these discussions, Shea Sunbelt requested that Accipiter and Qwest "work together" to
14 accomplish the request that a single ILEC serve the Development.

15 19. In direct response to Shea Sunbelt's request for a single ILEC, on or about August
16 22, 2002, Accipiter filed an application to extend its territory with the Arizona Corporation
17 Commission requesting that Accipiter's CC&N be extended to include the Qwest sections, and
18 Plaintiff entered into negotiations with Qwest, which resulted in Qwest's agreement to transfer
19 area containing the southern portion of Vistancia to Accipiter, and the transfer application was
20 later approved by the Corporation Commission.

21 20. As the incumbent local exchange carrier for the Development, Accipiter has
22 so-called "carrier of last resort" obligations for the Development. Upon information and belief,
23 Developer and Cox are all aware that Accipiter has carrier of last resort obligations for the
24 Development.

25 21. Shea Sunbelt formed Vistancia Communications after meeting with Qwest and
26 Accipiter, and after Accipiter filed the Transfer Application. Developer and Cox had knowledge

1 that Accipiter was proceeding with the Transfer Application.

2 **IV. The Common Services, Easements and Restrictions Agreement.**

3 The Shea Sunbelt and Vistancia Communications entered into an agreement entitled
4 Common Services Easements and Restrictions (the "CSER"), dated on or about June 10, 2003.
5 The CSER was recorded June 27, 2003, as Docket No. 2003-0837106 in the Official Records
6 of the Maricopa County Recorder. The same entities signed the CSER on behalf of both Shea
7 Sunbelt and Vistancia Communications, highlighting the fact that Shea Sunbelt and Vistancia
8 Communications are effectively one and the same.

9 22. Pursuant to the CSER, Shea Sunbelt granted to Vistancia Communications, its
10 wholly-owned and exclusively controlled subsidiary, the following exclusive and perpetual
11 easements:

12 (a) **In Gross Easement over the In Gross Easement Area.** The in
13 gross easement ("In Gross Easement") is an exclusive and perpetual easement
14 over, under and across certain real property within the Development (the "In
15 Gross Easement Area") for the purpose of identifying and contracting with
16 Communication Service Providers allowed to provide or otherwise make
available Facilities and Communication Services for the Development within the
In Gross Easement Area. Vistancia Communications has sole and complete
discretion in selecting the Communication Service Providers that will provide
Communication Services within the Development.
CSER at p. 3, § 2.01.

17 (b) **Service Easement over the Service Area.** The service easement
18 ("Service Easement") is an exclusive and perpetual easement over, under and
19 across certain real property within the Development (the "Service Easement
20 Area") to construct, lay, install, own, operate, lease, license, franchise, alienate,
21 assign modify, alter, supplement, inspect, maintain, repair, reconstruct, replace,
remove, relocate, expand or otherwise service in the Service Easement Area any
and all necessary or desirable Facilities of any type used to provide or make
available any Communication Services within the Development.
CSER at p. 3, § 2.02.

22 23. The CSER includes many defined terms such as: a "Communication
23 Service Provider" is a third party provider of one or more Communication Services
24 within the Development; the term "Facilities" means the construction, installation,
25 modification, alteration, supplementation, repair, reconstruction or replacement of any
26

1 and all necessary or desirable hardware or equipment of any type used to provider or
2 otherwise make available any Communication Services; and "Communication Services"
3 means cable television service, community technology services, e-commerce
4 transaction services, internet bandwidth access services, community intranet services,
5 telephone services (local), telephone services (long distance), video on-demand services
6 and security monitoring services.

7 24. Pursuant to § 2.03 of the CSER, the In Gross Easement and the Service
8 Easement (collectively referred to in the CSER as the "Combined Easement") are
9 intended "for the private, personal, exclusive and perpetual use and benefit of
10 [Vistancia Communications] and its grantees, licensees, lessees, franchisees, successors
11 and assigns who have been identified and contracted with [Vistancia Communications]
12 to own, install, repair, relocate, expand, or otherwise service the Facilities used by
13 Communication Service Providers in providing Communication Services to the
14 Development." The CSER requires Shea Sunbelt to protect Vistancia
15 Communications' "exclusive rights to provide Communication Services" and
16 specifically prohibits the use of the Combined Easement by Communication Service
17 Providers not authorized by Vistancia Communications. CSER at p. 5, § 2.06.

18 25. All utility providers other than Communication Service Providers are
19 granted access to the Development for the placement of their utility plant through
20 conventional dedicated public utility easements included in the Map of Dedication and
21 recorded plats. Communication Service Providers, on the other hand, are specifically
22 excluded from dedicated public utility easements, and may only gain access for the
23 placement of Facilities by executing an agreement with Vistancia Communications,
24 which has sole and absolute discretion to grant or deny such access.

25 26. Under the CSER, Vistancia Communications has sole and absolute
26 discretion to select a Communication Service Provider for the Development.

1 Conversely, under the language in the CSER, Vistancia Communications has sole and
2 absolute discretion to exclude any Communication Service Provider it so chooses by
3 denying access to the Combined Easement.

4 27. The CSER forms the foundation of a suite of documents hereinafter
5 described, which taken as a whole, demonstrate an intentional plan to exclude
6 competition and otherwise monopolize the delivery of wireline communications
7 services in Vistancia.

8 **V. Multi-Use Easements and Indemnity Agreement.**

9 28. On July 2, 2003, the Developer and the City of Peoria entered into an
10 agreement entitled Multi-Use Easements and Indemnity (the "MUE&I"). The MUE&I
11 was recorded July 23, 2003, as Instrument No. 2003-0975499 in the Official Records
12 of the Maricopa County Recorder.

13 29. The MUE&I sets forth several agreements between the City of Peoria, the
14 Developer and Vistancia Communications which were designed to facilitate the scheme
15 devised by the Developer and Cox to monopolize the telecommunications market while
16 protecting the City's ability to collect franchise fees, issue construction permits and
17 impose City construction code requirements, as if the City directly controlled the
18 Combined Easement. And, in the event a Communication Service Provider was to
19 mount a legal challenge to the scheme, the MUE&I requires Vistancia Communications
20 and the Developer to "indemnify, defend and hold harmless" the City from any "losses,
21 claims, damages, liabilities or actions." MUE&I at p. 4, § 4.01. The key elements of
22 the MUE&I are explained in the following paragraphs.

23 30. First, under the MUE&I the City of Peoria issues permits for the
24 construction of Facilities for Communication Services (a "Communication Facilities
25 Permit") within Multi-Use Easements ("MUEs," which are the dedicated easements
26 located within the Combined Easement) pursuant to "the same procedures under which

1 the City issues permits for the construction and installation of facilities within MUEs
2 for gas, electric, and other utility services." *Id.* at p. 3, § 2.02. However, prior to the
3 issuance of a Communication Facilities Permit, the City must confirm with Vistancia
4 Communications that the person or entity seeking a Communication Facilities Permit
5 has been granted a right to construct Facilities in the MUEs by Vistancia
6 Communications in accordance with the CSER, and the City acknowledges that
7 Vistancia Communications has exclusive discretion to admit or exclude any
8 Communication Service Provider to the MUEs. *Id.* at p. 2, § 2.01.

9 31. Second, under the MUE&I Shea Sunbelt and Vistancia Communications
10 agree that they will include in any contract or agreement entered into with any
11 Communication Service Provider a provision which (a) requires the Communication
12 Service Provider to pay to the City the franchise fees that would be payable by such
13 Communication Service Provider as if the City (as opposed to Vistancia
14 Communications) were the grantor of the right to provide Communication Services
15 and/or install Facilities within the MUEs, and (b) names the City as an intended third
16 party beneficiary entitled to enforce the provision set forth in the preceding item (a).
17 *Id.* at p. 3, § 3.01.

18 32. Third, under the MUE&I the Shea Sunbelt and Vistancia
19 Communications "agree and warrant that any construction, maintenance, or other
20 actions by the Developer in the MUEs will be done and repaired as if the MUEs were
21 held in fee by the City with no reserved rights held by the Developer." *Id.* at pp. 3-4,
22 § 3.02 (emphasis added). In other words, that construction, maintenance and repair
23 within the MUEs by Communication Service Providers was done in accordance with
24 City standards and the City of Peoria Code like all other utility construction within the
25 MUEs.

26 33. Fourth, under the MUE&I the Developer and Vistancia Communications

1 jointly and severally indemnify the City of Peoria from and against any losses, claims,
2 liabilities, damages or actions arising as a result of the MUE&I.

3 34. The City of Peoria can not administer the MUEs within the Development
4 in a way which denied access to telecommunications carriers or established one
5 telecommunications carrier as the monopoly. To do so would clearly run afoul of
6 Arizona's municipal right-of-way statutes, A.R.S. § 9-581, et seq., and other applicable
7 law.

8 **VI. Amended and Restated Declaration of Covenants, Conditions, Restrictions,**
9 **Reservations and Easements.**

10 35. The Amended and Restated Declaration of Covenants, Conditions,
11 Restrictions, Reservations and Easements for Vistancia Village A (dated July 31, 2003)
12 (the CC&Rs) provide that all rights and easements granted in the CSER run with the
13 land and are binding on the owners of lots and parcels within the Development. This
14 provision has the effect of limiting the rights of all property owners within the
15 Development to the Communication Service Provider selected by the Developer
16 through Vistancia Communications. The Developer has recorded similarly worded
17 CC&Rs for each portion of the Development that is under construction and being sold
18 to the public, and the Developer intends to record such CC& Rs applicable to all
19 parcels of property within Vistancia before each various parcel or area is sold to the
20 public.

21 **VII. Non-Exclusive License Agreement NELA-CMA.**

22 36. Vistancia Communications and CoxCom executed an agreement entitled
23 Non-Exclusive License Agreement effective as of December 31, 2003 (the
24 "NELA-CMA"). Cox Arizona Telcom and Cox Communications, Inc. are assignees
25 and/or direct beneficiary of the NELA-CMA. For purposes of the NELA-CMA, a
26 reference to CoxCom includes Cox Arizona Telcom and Cox Communications, Inc.

1 37. Pursuant to the NELA-CMA, Cox agreed to pay certain license fees to
2 Vistancia Communications in exchange for an irrevocable license for perpetual use of
3 the Service Easement, subject to the terms and limitations of the NELA-CMA and
4 another agreement between Vistancia Communications, and CoxCom entitled
5 Amended and Restated Co-Marketing Agreement and dated as of September 25, 2003
6 (the "CMA"). Accipiter requested a copy of the CMA from the Developer and Cox,
7 but they refused to provide a copy until June of 2005.

8 38. Pursuant to the NELA-CMA, Vistancia Communications is entitled to
9 \$500,000 "on or before ten (10) days after the date on which the first SFR or MFU
10 within the Village A portion of the Development is connected to any Communication
11 Service provided by [CoxCom]" and an additional \$500,000 "on or before ten (10) days
12 after the date on which the first SFR or MFU within the Trilogy portion of the
13 Development is connected to any Communication Service provided by [CoxCom]."
14 NELA-CMA at page 3, § 3.01 and Schedule 3.01. In addition, Vistancia
15 Communications receives a percentage of the revenues of CoxCom calculated on a
16 sliding scale once CoxCom reaches 75% penetration within the Development.
17 NELA-CMA at page 3, § 3.01 and Schedule 3.01. The sliding scale runs from 15% of
18 revenues at 75% penetration to 20% of revenues at 96% penetration.

19 **VIII. Non-Exclusive License Agreement NELA-PAA.**

20 39. Vistancia Communications and CoxCom executed an additional
21 agreement entitled Non-Exclusive License Agreement effective as of December 31,
22 2003 (the "NELA-PAA"). Upon information and belief, Cox Arizona Telcom is an
23 assignee and/or direct beneficiary of the NELA-PAA. For purposes of the
24 NELA-PAA, Accipiter believes that a reference to CoxCom includes Cox Arizona
25 Telcom and Cox Communications Inc.

26 40. Pursuant to the NELA-PAA, CoxCom agreed to pay certain license fees

1 to Vistancia Communications in exchange for an irrevocable license for perpetual use
2 of the Service Easement, subject to the terms and limitations of the NELA-PAA and
3 another agreement between Vistancia Communications, Vistancia LLC, and CoxCom
4 entitled Amended and Restated Property Access Agreement and dated as of September
5 25, 2003 (the "PAA"). Accipiter requested a copy of the PAA from the Developer and
6 Cox, but the Developer refused to provide a copy until June 2005.

7 41. Under the NELA-PAA, Vistancia Communications is entitled to a
8 percentage of revenues from CoxCom based upon a sliding scale which runs from 3%
9 of monthly recurring revenues at 75% penetration to 5% of monthly recurring revenues
10 at 96% penetration. NELA-CMA at page 3, § 3.01 and Schedule 3.01.

11 42. The CSER, MUE&I, CC&Rs, NELA-CMA, NELA-PAA, CMA and
12 PAA constitute a suite of documents that were devised by the Developer and Cox to (i)
13 establish a barrier to entry into the telecommunications market within the Development
14 to any Communication Service Provider other than Cox Arizona Telcom; and (ii)
15 monopolize the telecommunications market so as to maximize profits to the Developer
16 and Cox.

17 43. At or about the end of June, 2003, the Developer represented to Accipiter
18 that there would be a up-front license fee of \$500,000 per phase that Accipiter would
19 be required to pay for access to the easements in Vistancia. The Developer expressly
20 represented to Accipiter and to the City of Peoria that this license fee being demanded
21 of Accipiter was the same terms for access required of any carrier for access to the
22 development. And specifically, the Developer and Cox expressly represented to
23 Accipiter on numerous occasions that Cox is subject to the same terms as Accipiter for
24 access to the Development and that Cox will pay and has paid the \$500,000 per phase
25 license fee, the same as all other wireline communications providers that desire to gain
26 access to Vistancia.

1 44. In or about October of 2003, the Developer presented a form of non-
2 exclusive license agreement to Accipiter, which the Developer represented was the
3 same terms of access being required of Cox, and that would be offered to any other
4 communications provider that may request access to Vistancia. Contrary to this
5 representation by the Developer, the CMA and PAA terms that were included in the
6 Vistancia Communications-CoxCom NELAs, were not included in the non-exclusive
7 license agreements offered to Accipiter.

8 45. Accipiter requested copies of the CMA and PAA from the Developer and
9 Cox, but they refused to provide them claiming that they were confidential instruments.

10 46. Contrary to the multiple representations made by Cox and the Developer
11 to Accipiter, Accipiter was not being offered the same terms for access to the
12 Development as Cox was receiving and paying. To the contrary, Cox payment of
13 \$500,000 per phase for the first two phases of Vistancia under the CoxCom-Developer
14 NELA-CMA, was nothing but a sham payment of no economic consequence to Cox,
15 because the Developer previously secretly paid Cox \$1,000,000 for the sole purpose of
16 having Cox return the \$1,000,000 to the Developer as a sham payment for the first two
17 phases under the publically disclosed NELAs to create the false impression that Cox
18 was paying the same amounts being demanded of other carriers, including Accipiter.

19 47. Additionally, the NELAs require carriers to pay a percentage of the
20 revenues from customers to the Developer purportedly in return for permission from
21 the Access Entity for the carriers to approach the City for a permit to use the utility
22 easements in Vistancia. However, that payment term for Cox is also a sham designed
23 and employed by Cox and the Developer to carry out an elaborate scheme to
24 monopolize telecommunications services in Vistancia.

25 48. Contrary to the multiple representations made in the CoxCom-Developer
26 NELA-CMA and NELA-PAA, the requirements for Cox to pay a percentage of the

1 revenues to the access entity were not in return for the license as it seems in the
2 NELAs, but instead, for Cox only, this requirement was consideration for the
3 confidential CMA and PAA terms incorporated only into Cox's NELA-CMA and
4 NELA-PAA. In fact, contrary to the multiple representations by the Developer and
5 Cox, that Cox was being offered and was paying the same terms for access to Vistancia
6 as were being offered to all other communications carriers, as an undisclosed part of
7 Cox's terms for access to Vistancia as later described by Cox, Cox was also receiving
8 certain valuable preferred marketing arrangements and Capital Contributions from the
9 Developer and numerous other valuable benefits under the confidential CMA and PAA
10 terms in the Cox/Developer NELAs which were offered to no other carriers, and were
11 actively concealed from all other carriers by Cox and the Developer.

12 49. The public requirement for payment of \$500,000 per phase, and the
13 payment of a percentage of the gross revenues back to the Developer, without the
14 marketing arrangements and other contractual benefits being provided to Cox,
15 effectively prohibit the entry of a competitor into Vistancia to provide communication
16 services to the public.

17 **IX. Public Policy Supports Open Access to Utility Easements.**

18 50. There is strong public policy supporting open access to easements for
19 public utilities including communications providers. For example, State statutes A.R.S.
20 § 9-581 *et. seq.* require political subdivisions (including the City of Peoria) to allow use
21 of their right-of-ways by telecommunications providers on a non-discriminatory basis.
22 More specifically, A.R.S. § 9-583(A) provides: "A political subdivision shall not adopt
23 any ordinance that may prohibit or have the effect of prohibiting the ability of any
24 telecommunications corporation to provide telecommunications service." These
25 statutes require license or franchise fees to be imposed "on a competitively neutral and
26 non-discriminatory basis." A.R.S. § 9-583(B). The Arizona statutes also place limits

1 on the fees that can be charged. *E.g.* § 9-583(C). Also, A.R.S. § 9-582(A) requires
2 application fees and construction permit fees to be applied on a competitively neutral
3 and non-discriminatory basis, and further requires application and permit fees to be
4 “directly related to the costs incurred by the political subdivision in providing services
5 relating to the granting or administration of applications or permits.” The breadth of
6 public policy favoring open and non-discriminatory access to the public right-of-way
7 is further evidenced in the City of Peoria’s development and subdivision codes,
8 standards, and requirements, which mandate public utility easements dedicated to the
9 public use. For example, the Peoria City Code on subdivision platting requires
10 subdividers to “provide for Utility Easements as required by the appropriate Utility or
11 the City of Peoria in accordance with the Utility’s specifications, the City of Peoria
12 Infrastructure Development Guidelines and other applicable City construction codes
13 and standards.” Peoria City Code, Section 24-92. And the City’s Site Plan & Design
14 Review Process Guide requires subdividers to provide: “Right-of-way/easement
15 dedication (8' PUE outside of all ROW).” Additionally, Plaintiff’s CC&N and its
16 carrier of last resort obligations, and its status as an ILEC further support the public
17 policy supporting open access to easements for public utilities. These and other State,
18 Federal and local laws, regulations, standards, doctrines, and procedures require and
19 assure that public utility easements will be available to the public and to all phone and
20 communications companies alike in today’s competitive communications environment.

21 51. Consistent with the CSER and the MUE&I, the Developer created a
22 series of maps, plats and other documents that implement and apply the MUEs in
23 Vistancia, such as the Map of Dedication of Vistancia Phase 1A, recorded on August
24 12, 2003 in the Official Records of the Maricopa County Recorder’s Office at Book
25 647, Page 31, and the Final Plat of Vistancia Village A Parcel 36, recorded on October
26 9, 2003 in the Official Records of the Maricopa County Recorder’s Office at Book 655,

1 Page 30, and numerous other maps, plats, and instruments, which were caused to be
2 recorded. The MUEs are configured on these maps, plats, and instruments such that
3 a wireline communications provider cannot access the lots in Vistancia without access
4 through the MUE areas.

5 **Count One:**
6 **(Violation of §44-1402 of**
7 **Arizona Uniform State Antitrust Act)**

8 52. Plaintiff repeats and realleges all of the allegations in the above
9 Paragraphs as if fully set forth herein.

10 53. Sales of a suite of communications services including landline telephone
11 service, broadband Internet access and cable television to property owners within and
12 throughout the Vistancia Development are trade and commerce within the State of
13 Arizona subject to the Arizona Uniform State Antitrust Act (hereafter "Antitrust Act").
14 Said trade and commerce constitute a relevant product and geographic market wherein
15 competition has been unlawfully restrained, that has been unlawfully monopolized, and
16 wherein plaintiff has incurred antitrust injury in violation of the Antitrust Act.

17 54. Sales of a suite of communications services including landline telephone
18 service, broadband Internet access and cable television to property owners within and
19 throughout Plaintiff's authorized service territory as defined by Plaintiff's CC&N are
20 trade and commerce within the State of Arizona subject to the Antitrust Act. Said trade
21 and commerce constitute a relevant product and geographic market wherein
22 competition has been unlawfully restrained, that is now threatened with unlawful
23 monopolization, and wherein Plaintiff has incurred antitrust injury in violation of the
24 Antitrust Act.

25 55. Sales of each kind of communications service within the suite of services
26 described in paragraphs 53 and 54 within and throughout the Vistancia Development
are also a relevant product and geographic market or submarket wherein competition

1 has been restrained, that has been unlawfully monopolized, and wherein Plaintiff has
2 incurred antitrust injury in violation of the Antitrust Act. Sale of each such
3 communications service within and throughout plaintiff's authorized service territory
4 are also a relevant product and geographic market or submarket wherein competition
5 has been restrained, that is now threatened with unlawful monopolization, and wherein
6 Plaintiff has incurred antitrust injury in violation of the Antitrust Act.

7 56. By and through all of the agreements and associated conduct of the Cox
8 and Developer Defendants as detailed throughout the above paragraphs, the Cox and
9 Developer Defendants have contracted, combined and conspired to restrain and
10 eliminate competition, to exclude plaintiff or impede plaintiff's ability to compete
11 generally, and to monopolize or attempt to monopolize each of the markets and
12 submarkets described in paragraphs 53 through 55, all in violation of §44-1402 of the
13 Antitrust Act.

14 57. The Cox and Developer Defendants' conspiracy and associated conduct
15 have deprived property owners throughout the Vistancia Development of any choice
16 for their communications needs, deprived them of the superior service and technology
17 that competition would bring, and deprived them of the lower rates that competition
18 would bring. The Cox and Developer Defendants' conspiracy and associated conduct
19 threatens these same anticompetitive effects and resulting injury to property owners
20 throughout Plaintiff's authorized service territory because, by excluding Plaintiff from
21 serving more than 95% of the expected population of that territory, Plaintiff is deprived
22 of any reasonable prospect of competitive viability and the territory as a whole is
23 thereby threatened with monopolization.

24 58. There is no reasonable or legitimate business justification for any of the
25 exclusionary or otherwise competition-suppressing features of the contracts and
26 associated arrangements described in the above paragraphs. Any purported

1 “efficiencies” of these contracts and arrangements are far outweighed by the
2 anticompetitive effects described in paragraph 57.

3 59. The Cox and Developer Defendants’ conspiracy and associated conduct
4 as described hereinabove violates §44-1402 of the Antitrust Act. Plaintiff has been
5 injured in its business and property and has incurred antitrust injury as a direct result
6 of said violation. The violation is flagrant, thereby entitling Plaintiff to three times the
7 damages sustained. The violation is continuing and, unless enjoined and restrained,
8 threatens both further anticompetitive effects and further antitrust injury to plaintiff,
9 thereby entitling plaintiff to injunctive and other equitable relief. Plaintiff is also
10 entitled to its costs and reasonable attorneys’ fees in the prosecution of this action.

11 **Count Two:**
12 **(Violations of §44-1403 of**
Arizona Uniform State Antitrust Act)

13 60. Plaintiff repeats and realleges all of the allegations in the above
14 Paragraphs as if fully set forth herein.

15 61. The Cox and Developer Defendants have established, maintained and
16 used a monopoly over the relevant market described in paragraph 51 and over relevant
17 submarkets therein for the purpose of excluding competition and controlling, fixing or
18 maintaining prices therein. The Cox and Developer Defendants have thereby violated
19 §44-1403 of the Antitrust Act.

20 62. The Cox and Developer Defendants have attempted to establish a
21 monopoly, and now threaten to achieve this objective, over the relevant market
22 described in paragraph 52 and over relevant submarkets therein for the purpose of
23 excluding competition and controlling, fixing or maintaining prices therein. The Cox
24 and Developer Defendants have thereby violated §44-1403 of the Antitrust Act.

25 63. The Cox and Developer Defendants’ conduct constituting the violation
26 alleged in paragraph 61 has deprived property owners throughout the Vistancia

1 Development of any choice for their communications needs, deprived them of the
2 superior service and technology that competition would bring, and deprived them of the
3 lower rates that competition would bring. The Cox and Developer Defendants' conduct
4 constituting the violation alleged in paragraph 62 threatens these same anticompetitive
5 effects and resulting injury to property owners throughout plaintiff's authorized service
6 territory because, by excluding plaintiff from serving more than 95% of the expected
7 population of that territory, plaintiff is deprived of any reasonable prospect of
8 competitive viability and the territory as a whole is thereby threatened with
9 monopolization.

10 64. There is no reasonable or legitimate business justification for any of the
11 exclusionary or otherwise competition-suppressing features of the conduct constituting
12 the violations alleged in paragraphs 59 and 60. Any purported "efficiencies" of these
13 features are far outweighed by the anticompetitive effects described in paragraph 63.

14 65. As a direct result of Cox and Developer Defendants' violations, plaintiff
15 has been injured in its business and property and has incurred antitrust injury. The
16 violations are flagrant, thereby entitling plaintiff to three times the damages sustained.
17 The violations are continuing and, unless enjoined and restrained, threaten both further
18 anticompetitive effects and further antitrust injury to plaintiffs, thereby entitling
19 plaintiff to injunctive and other equitable relief. Plaintiff is also entitled to its costs and
20 reasonable attorneys' fees in the prosecution of this action.

21
22 **Count Three:**
(Promissory Estoppel)

23 66. Plaintiff repeats and re-alleges all of the allegations in the above
24 Paragraphs as if fully set forth herein.

25 67. The Developer and Cox each made promises to Plaintiff that Plaintiff
26

1 would be allowed and was being allowed access to the utility easements in Vistancia
2 on the same terms as Cox. It was reasonably foreseeable to the Developer and Cox that
3 Plaintiff would rely on that promise.

4 68. Plaintiff justifiably relied upon that promise.

5 69. Plaintiff incurred a loss and suffered detriment as a result of such
6 reliance.

7 70. Cox and the Developer have breached that promise causing significant
8 harm to Accipiter in an amount to be determined at trial, but no less than the
9 jurisdictional minimum of this Court, for which Cox and the Developer are liable to
10 Plaintiff.

11
12 **Count Four:**
(Tortious Interference with Business Expectancy)

13 71. Plaintiff repeats and re-alleges all of the allegations in the above
14 Paragraphs as if fully set forth herein.

15 72. Plaintiff has a legally protected business interest and expectancy in
16 reasonable and non-discriminatory access to the utility easements within public
17 developments for the purposes of providing communications services to the public.

18 73. Cox and the Developer knew of this legally protected business interest.

19 74. Cox and the Developer intentionally interfered with Plaintiff's rightful
20 access to the utility easements in Vistancia, contrary to Plaintiff's lawfully protected
21 business interest and expectancy.

22 75. Cox's and the Developer's conduct was improper.

23 76. As a result, Plaintiff suffered damages caused by Cox's and the
24 Developer's tortious interference with Plaintiff's legally protected business expectancy,
25 in an amount to be determined at trial, but no less than the jurisdictional minimum of
26 this Court, for which Cox and the Developer are liable to the Plaintiff.

**Count Five
(Negligent Misrepresentation)**

77. Plaintiff repeats and re-alleges all of the allegations in the above Paragraphs as if fully set forth herein.

78. Cox and Developer provided Plaintiff with false or incorrect information, or omitted or failed to disclose material information.

79. Cox and Developer intended that Plaintiff rely on the information provided and Cox and Developer provided it for that purpose.

80. Cox and Developer failed to exercise reasonable care or competence in obtaining or communicating the information.

81. Plaintiff relied on the information.

82. Plaintiff's reliance on the information was justified.

83. As a result, Plaintiff was damaged in an amount to be determined at trial, but no less than the jurisdictional minimum of this Court, for which Cox and the Developer are liable to Plaintiff.

**Count Six:
(Common Law Fraud)**

84. Plaintiff repeats and re-alleges all of the allegations in the above Paragraphs as if fully set forth herein.

85. Cox and the Developer made representations to the Plaintiff that Plaintiff would be allowed access to Vistancia under the same terms offered Cox as alleged above.

86. The representations were false.

87. The representations were material, in that they were sufficiently important to influence Plaintiff's actions, causing Plaintiff to fail to present certain facts to the City of Peoria, and causing Plaintiff to otherwise lack sufficient knowledge to discover

1 Cox's and the Developer's unlawful scheme until much later after Plaintiff had been
2 excluded from significant portions of Vistancia, and after significant irreparable and
3 other harm had occurred, and other material influences as described above had
4 occurred.

5 88. Cox and the Developer knew that the representations were false.

6 89. Cox and the Developer intended that Plaintiff would act upon the
7 representations in a manner reasonably contemplated by Cox and the Developer which
8 was that Plaintiff would not pay the amounts being demanded for access to the
9 Development and instead would not enter into competition with Cox to provide
10 communications services within the Development and would lack knowledge sufficient
11 to stop or otherwise expose Cox and Developers wrongful actions, and would otherwise
12 act or fail to act to Plaintiff's detriment.

13 90. Plaintiff did not know that the representations were false.

14 91. Plaintiff relied on the truth of the representations.

15 92. Plaintiff's reliance was reasonable and justified under the circumstances.

16 93. As a result, Plaintiff was damaged in an amount to be determined at trial,
17 but no less than the jurisdictional minimum of this Court, for which Cox and the
18 Developer are liable to Plaintiff.

19 **Count Seven:**
20 **(Punitive Damages)**

21 94. Plaintiff repeats and re-alleges all of the allegations in the above
22 Paragraphs as if fully set forth herein.

23 95. The actions of the Cox and Developer Defendants alleged in his
24 Complaint were intentionally undertaken by them with the intent and purpose of
25 causing significant harm to Plaintiff and to benefit the Cox and Developer Defendants,
26 or alternatively were undertaken by the Cox and Developer Defendants for their own

1 benefit with reckless and wanton disregard to the high risk of significant economic
2 harm to Plaintiff.

3 96. As a result, Plaintiff has the right to recover punitive damages in an
4 amount to be determined at trial, but no less than the jurisdictional minimum of this
5 Court, for which Cox and the Developer are liable to Plaintiff.

6
7 **Count Eight:**
(Declaratory Judgment)

8 97. Plaintiff repeats and re-alleges all of the allegations in the above
9 Paragraphs as if fully set forth herein.

10 98. The City of Peoria has approved and caused to be recorded numerous
11 plats and other subdivision documents relating to Vistancia which are unlawful and
12 otherwise invalid because of the unlawful CSER, MUE&I and MUEs referenced in and
13 incorporated in the plats and documents.

14 99. The Cox-Developer CMA and PAA agreements are integral parts of the
15 Cox and Developer's unlawful acts and scheme and are otherwise unlawful and invalid.

16 100. The Defendants apparently dispute that the multiple plats and subdivision
17 documents relating to Vistancia are invalid and unlawful, and the Cox and Developer
18 Defendants apparently dispute that the CMA and PAA are unlawful and invalid.

19 101. An actual and justiciable controversy that is ripe for judicial resolution
20 exists between the Plaintiff and the Defendants regarding whether the plats and other
21 documents relating to Vistancia are unlawful and invalid and regarding whether the
22 CMA and PAA are unlawful and invalid.

23 102. Pursuant to A.R.S. § 12-1831 *et seq.*, the Parties have the right to a
24 declaratory judgment of this Court setting forth their respective rights with regard to
25 the lack of validity of the plats and other subdivision documents in Vistancia and the
26 unlawfulness of the MUE's and the MUE&I dedication on them, and the unlawfulness

1 and lack of validity of the CMA and PAA.

2
3 **Count Nine:**
(Injunction Against Issuing Building Permits)

4 103. Plaintiff repeats and re-alleges all of the allegations in the above
5 Paragraphs as if fully set forth herein.

6 104. Plaintiff's business relationship and the availability of public utility
7 easements is unique, such that Plaintiff will suffer irreparable harm and will not have
8 an adequate remedy at law in the event that construction is allowed to continue under
9 the unlawful plats and other instruments which violate multiple State statutes and other
10 applicable law.

11 105. Under A.R.S. § 12-1801 and other applicable law, Plaintiff has the right
12 to an injunction issued by the Court barring the City from issuing any further building
13 permits for Vistancia until such time as the unlawful CSER, MUE&I, and the MUE's
14 are terminated, and the unlawful plats and other documents are corrected.

15 **WHEREFORE**, Plaintiff Accipiter Communications, Inc. respectfully requests
16 that the Court enter judgment in Plaintiff's favor and against Defendants as follows:

17 A. Awarding damages for Plaintiff and against Defendants Shea Sunbelt,
18 Vistancia Communications, Cox Arizona Telcom, CoxCom and Cox Communications,
19 Inc., in an amount to be determined at trial, but in no event less than the jurisdictional
20 minimum of this Court;

21 B. Awarding punitive damages for Plaintiff and against Defendants Shea
22 Sunbelt, Vistancia Communications, Cox Arizona Telcom, CoxCom and Cox
23 Communications, Inc., in an amount to be determined at trial, but in no event less than
24 the jurisdictional minimum of this Court;

25 C. Issuing an injunction ordering Defendants Shea Sunbelt, Vistancia
26 Communications, Cox Arizona Telcom, CoxCom, and Cox Communications, Inc. to

1 stop all violations of the Arizona Uniform State Antitrust Act.

2 D. Declaring that the plats and other recorded instruments for the Vistancia
3 development and the CMA and PAA are unlawful and invalid;

4 E. Issuing an injunction ordering the City and its Community Development
5 Department Director to stop all further issuance of building permits for the Vistancia
6 development until the CSER, MUE&I, and MUEs are abolished and all recorded
7 instruments on which the CSER, MUE&I and MUE are referenced are corrected and
8 made lawful.

9 F. For an award of Plaintiff's costs and reasonable and actual attorneys' fees
10 incurred in bring this action pursuant to A.R.S. §§ 12-341.01, and other applicable law;

11 G. For such other and further relief as the Court deems just and equitable
12 under the circumstances.

13 RESPECTFULLY SUBMITTED this 30th day of JUNE, 2005.

14 MORRILL & ARONSON, P.L.C.

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